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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1994,

JOHN W. SHOEMAKER, et al.,
Petitioners,

v.

GLENN S. KELLOGG, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT BELOW SHOULD RECONSIDER ITS EX POST FACTO RULING DECIDED PRIOR TO THIS COURT'S DECISION IN *CALIFORNIA V. MORALES* ___ U.S. ___, 115 S.CT. 1597 (1995).

II. WHETHER THE EX POST FACTO CLAUSE, AS INTERPRETED IN *CALIFORNIA V. MORALES, SUPRA*, PERMITS STATES TO AMEND REGULATIONS GOVERNING THE PROCEDURES UNDER WHICH PAROLE MAY BE REVOKED AND APPLY THOSE AMENDMENTS TO PREVIOUSLY SENTENCED INMATES WHO HAVE COMMITTED A NEW CRIME WHILE ON PAROLE.

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LANI R. SMITH;
LAWRENCE DESSENBERG;
JOHN STAMPER;
MICHAEL JONES;
ROBERT DONLEY;
DANIEL SCHREIBER;
MICHAEL KARHOFF,

Respondents.

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OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed on January 9, 1995, in Case No. 93-4287, is reported as *Kellogg v. Shoemaker*, 46 F. 3d 503 (6th Cir. 1995), and is reproduced at A-1.

The Order of the United States District Court for the Southern District of Ohio, Eastern Division, filed on March 22, 1995, enjoining Petitioners from applying Ohio Administrative Code Section 5120:1-1-21 to members of the class who committed initial offenses prior to September 1, 1992, is reproduced at A-14.

The Order and Opinion of the United States District Court for the Southern District of Ohio, Eastern Division, filed on October 22, 1993, denying Respondents' Motion to Alter or Amend Judgment, is reproduced at A-16.

The Order and Opinion of the United States District Court for the Southern District of Ohio, Eastern Division, filed on May 27, 1993, entering summary judgment for Petitioners is reproduced at A-21.

The Order of the United States District Court for the Southern District of Ohio, Eastern Division, filed on December 9, 1992, granting summary judgment against named Respondents Glenn S. Kellogg, Lani R. Smith and John Stamper, is reproduced at A-35.

The Order of the United States Court of Appeals for the Sixth Circuit, filed on February 28, 1995, denying Petitions for Rehearing, is reproduced at A-39.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 9, 1995. (A-1). Timely petitions for rehearing were denied on February 28, 1995, and this petition is timely filed. Sup. Ct. R. 13. Jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Art. I, Section 10

No State shall ... pass any ... ex post facto Law ...

STATEMENT OF THE CASE

On August 15, 1990, inmate Glenn Kellogg brought suit against Ohio parole authorities under 42 U.S.C. Section 1983, alleging that Ohio's parole revocation procedures violated his rights. Subsequently, the District Court certified the case as a class action, to include "all persons whose parole was, or will be, revoked by the Ohio Adult Parole Authority through a so-called parole-violator recommissioned hearing because they have been convicted of a new felony committed while on parole." Kellogg and other named inmates maintained that the hearings provided by State parole authorities to parole violators recommissioned (PVRs), e.g., inmates whose paroles were revoked because they were convicted of a felony committed while on parole, failed to satisfy constitutional due process standards. The inmates sought a declaratory judgment and injunctive relief.[1]

Effective November 29, 1992, Ohio parole authorities promulgated Ohio Administrative Code Section 5120:1-1-21, which provided that parole authorities shall revoke the release of any parolee who is recommitted based on conviction for an offense committed while on parole.[2] In effect, the regulatory change provided that revocation hearings would no longer be afforded to PVRs. Based on the latter administrative change, on May 28, 1993, the District Court dismissed the class action as moot. (A-21). In its opinion and order, the District Court noted that the action

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[1] On December 8, 1992, the District Court granted summary judgment in favor of the parole authorities against named plaintiffs Kellogg, Smith and Stamper, on the ground that unsuccessful mandamus actions by these inmates in state court barred them, under the doctrine of res judicata, from seeking relief in federal court.

[2] The Sixth Circuit subsequently determined the effective date of the new regulation to be September 1, 1992.

sought only declaratory and future injunctive relief, and that the inmates did not, and could not, challenge the lawfulness of the current confinement of a member of the class, because such an attack is properly brought only in the context of a habeas corpus action under 28 U.S.C Section 2241.

The inmates then moved to alter or amend the judgment, arguing, *inter alia*, that application of the new administrative rule to inmates initially convicted prior to the effective date of the new regulation violated the constitutional prohibition against *ex post facto* laws. In denying the motion to alter or amend, the District Court, in its order and opinion of October 22, 1993, found that the new regulation had not been applied to remedy any defect in the revocation procedures followed in the past. Accordingly, the District Court rejected the inmates' *ex post facto* claim. (A-16)

The inmates appealed. On January 9, 1995, the Sixth Circuit Court of Appeals sustained the District Court's mootness determination with respect to the inmates' challenge to the adequacy of parole revocation hearings under procedures effective prior to September 1, 1992. However, the Sixth Circuit also held that with respect to some of the inmates, the new regulation could be impermissible under the *ex post facto* clause. The Sixth Circuit found specifically that because the new regulation eliminated a "substantial right" to discretionary consideration for continued parole, it constituted an impermissible *ex post facto* law with respect to inmates whose initial offense occurred before September 1, 1992, the effective date of the new regulation. (A-12)

Notwithstanding the above, the Sixth Circuit, in the concluding paragraph of its opinion, appeared to limit the *ex post facto* holding only to those inmates whose subsequent conviction predated the effective date of the new rule.

Accordingly, it sustained the District Court "in all respects, except as to those prisoners, if any, who committed initial offenses *and also a parole violation offense conviction* prior to September 1, 1992, but whose parole revocation procedures will be governed by the new regulations." (A-13) It then remanded the case for the District Court "to provide prospective injunctive relief as to those limited members of the plaintiff class described in this opinion." (A-13)

On January 23, 1995, Ohio parole authorities petitioned for a rehearing, on the basis that the Sixth Circuit's opinion was unclear as to the class of inmates for which application of the new procedure would be enjoined on *ex post facto* grounds. On or about January 19, 1995, the inmates separately petitioned for rehearing. On February 28, 1995, the Sixth Circuit denied both petitions for rehearing.[3] While acknowledging an "inconsistency" in its opinion, the Sixth Circuit declined to elaborate further on its *ex post facto* analysis, but instead ordered that the opinion's references to "parole offense conviction[s] prior to September 1, 1992" be stricken. (A-40)

On March 22, 1995, the District Court entered final judgment consistent with the Sixth Circuit's mandate. The District Court's order provided specifically that application of Ohio Administrative Code Section 5120:1-1-21, to members of the plaintiff class who committed initial offenses prior to the effective date of the regulation, September 1, 1992, but whose parole revocation procedures are conducted after September 1, 1992, constitutes an *ex post facto* law, and its application to such persons is enjoined. The District Court's order further provided that those class members who committed their initial crime before September 1, 1992, but

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[3]The Sixth Circuit's denial of the petitions for rehearing occurred before this Court's decision in *Morales, supra*.

whose parole revocation proceedings are conducted after September 1, 1992, "are entitled to the procedural safeguard outlined in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Moss v. Patterson*, 555 F. 2d 137 (6th Cir.), *cert. denied, sub nom. Kette v. Moss*, 434 U.S. 873 (1977)," e.g. the mitigation hearing permitted under the prior parole revocation procedure. (A-15)

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

Petitioners submit that the writ of certiorari should be granted in this case, because the Sixth Circuit's decision -- that the *ex post facto* clause prohibited the change in parole revocation procedures solely on the ground of an alleged "substantial disadvantage" to the inmates -- is patently contrary to this Court's fundamental view of the application of the clause, as reaffirmed in the Court's recent decision of *California Department of Corrections et al. v. Morales*, __ U.S. __, 115 S.Ct. 1597 (1995). Accordingly, Petitioner asks that the Court grant certiorari, vacate the Sixth Circuit's judgment, and remand the case for reconsideration in light of *Morales*. In the alternative, Petitioner asks the Court to grant certiorari and to review the case, on the basis that the change in question does not increase in any sense the inmates' punishment for their initial offenses. Thus, *Morales* requires a conclusion that the Sixth Circuit erred in applying the *ex post facto* clause.

I. THE SIXTH CIRCUIT'S DECISION IS IN PATENT CONFLICT WITH THIS COURT'S FUNDAMENTAL VIEW OF THE APPLICATION OF THE EX POST FACTO CLAUSE, AS REAFFIRMED IN THE COURT'S RECENT DECISION OF *CALIFORNIA DEPARTMENT OF CORRECTIONS V. MORALES*, ___ U.S. ____, 115 S. Ct. 1597 (1995)

As early as *Warden v. Marrero,* 417 U.S. 653 (1974), this Court suggested that a change in parole eligibility could raise *ex post facto* concerns if the net result is an increased term of actual imprisonment. In the wake of *Marrero*, cases applying the *ex post facto* clause to such post-conviction proceedings as parole eligibility and "good time" credit reflected generally two distinct views with respect to the scope of the clause's protection as expressed in the Court's decisions. An historical and more limited view focused on the clause's basic protection against arbitrary, retrospective increases in a prisoner's punishment. *See Miller v. Florida*, 482 U.S. 423 (1987); *Roller v. Cavanaugh*, 984 F.2d 120, 122 (4th Cir. 1993). A second view, based primarily on specific language in *Warden v. Marrero, supra,* and *Lindsey v. Washington*, 301 U.S. 397 (1937), favored a more expansive scope of protection, to the effect that the *ex post facto* clause forbade legislation that operates to the "substantial disadvantage" of prisoners, whether or not the legislation is "technically an increase in the punishment annexed to the crime." *Lindsey v. Washington, supra,* at 401-402; *Rodriquez v. U.S. Parole Comm'n*, 594 F. 2d 170, 176 (7th Cir. 1979).

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the Court suggested that the focus of the *ex post facto* clause remains on the specific protection against retrospective

conviction and punishment, as opposed to a general prohibition on infringement of "substantial rights." On April 25, 1995, the Court decided *California Department of Corrections, et al. v. Morales,* ___ U.S. ___, 115 S. Ct. 1597 (1995), wherein the Court held that the *ex post facto* clause did not preclude retrospective application of the statutory changes in question. In so holding, the Court reaffirmed its rationale in *Collins, supra,* and disapproved specifically the language in *Lindsey, supra,* which suggested a more expanded view of the clause.

The California statute in question had entitled Morales to an annual parole suitability hearing, but was amended ten years after Morales' conviction to permit parole authorities to defer the hearing for up to three years under specified circumstances. Morales contended that parole eligibility is annexed to the punishment for the underlying offense and accordingly, under *Lindsey v. Washington, supra, Weaver v. Graham*, 450 U.S. 24 (1981), and *Miller v. Florida*, 482 U.S. 423 (1987), retrospective change to the parole suitability statute violated the *ex post facto* clause. Alternatively, Morales argued that if the statutory change could not be deemed to have affected his punishment, the *ex post facto* clause nevertheless forbade any legislative change that has any conceivable risk of affecting a prisoner's punishment.

Rejecting Morales' first argument out of hand, the Court held that the statutory change had nothing to do with the definition of Morales' crime nor did it alter the formula under which Morales' sentence was calculated, and thus, under *Collins*, the *ex post facto* clause was not implicated. The Court then noted:

> After Collins, the focus of the ex post facto inquiry is not on whether a legislative change

> produces some ambiguous sort of "disadvantage," *nor, as the dissent seems to suggest, on whether amendment affects a prisoner's "opportunity to take advantage of provisions for early release,"* see post, at 5, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punished. [Emphasis added].

Morales, supra, at note 3. Accordingly, the Court discredited totally the premise that a change in parole eligibility rules, by virtue of a possible effect upon the prisoner's opportunity for early release, should be equated ipso facto with a retrospective increase in punishment prohibited by the *ex post facto* clause.

In other words, the *ex post facto* clause does *not* exclusively focus on determining whether there has been a change in the conditions existing at the time of the inmates' initial offense, but rather on whether such change has actually increased the punishment for the initial offense. In contrast, the Sixth Circuit in this case focused exclusively on a perceived change in conditions, without considering whether the change had an impact on the sentence.

But more importantly, in rejecting Morales' second argument, the Court stated that the risk of affecting a prisoner's punishment posed by a legislative change in the frequency of parole hearings, even a change that totally eliminates a possible hearing, is not determinative in applying the *ex post facto* clause:

> The dissent proposes a line between those measures that deprive prisoners of a parole hearing and those that "make it more difficult

> for prisoners to obtain release." Post, at 12 - 13. But this arbitrary line has absolutely no basis in the Constitution. *If a delay in parole hearings raises ex post facto concerns, it is because that delay effectively increases a prisoner's term of confinement, and not because the hearing itself has independent constitutional significance. Other adjustments to mechanisms surrounding the sentencing process should be evaluated under the same standard.* [Emphasis added].

Morales, supra, at note four.

In short, this Court in *Morales* reaffirmed categorically the Court's rejection in *Collins* of the expanded view of the clause's protection; accordingly, the elimination of a parole hearing, even if to the "substantial disadvantage" of the prisoner, is not in and of itself a violation of the *ex post facto* clause.

In the case at hand, the Sixth Circuit's resolution of the inmates' *ex post facto* claim hinged upon two basic conclusions: first, like parole eligibility, for the purposes of *ex post facto* analysis, the change in parole revocation procedures must be considered "retrospective" insofar as it occurred after the time of the inmates' initial offenses; and second, elimination of the mitigation hearing could not be done "retrospectively" because it would amount to a "substantial disadvantage" prohibited by the *ex post facto* clause.

In reaching the first conclusion, the Sixth Circuit reasoned, based on *Rodriquez v. United States Parole Comm'n*, *supra*, that the *ex post facto* clause required absolutely a focus on the time of the inmate's initial offense,

as opposed to the time of the commission of the parole violation, e.g., conviction for an offense committed while on parole. " ('[A]lthough parole eligibility is determined as of the date of sentencing for some purposes ... the ex post facto clause looks to the punishment annexed at the time the crime was committed.')" (A-11). Thus the Sixth Circuit found that the change in parole revocation procedures in question must be deemed to have "retrospective" effect with respect to all inmates whose initial offenses were committed prior to the effective date of the change. The Sixth Circuit then concluded that with respect to inmates who committed their initial offenses prior to the effective date of the regulatory change, the new regulation violated the *ex post facto* clause because it did away with the previously available mitigation hearing, and thereby deprived the inmates of a "substantial right" to discretionary consideration for continued parole (A-12).

Petitioners submit that the Sixth Circuit's reasoning is part and parcel of the expanded view of the clause's protection which this Court has definitively rejected. As the Court made clear in *Morales*, a change in parole eligibility rules cannot be considered ipso facto to effect an increase in punishment for the purposes of the *ex post facto* clause; accordingly, the Sixth Circuit's reliance on *Rodriguez* in focusing on the time of the inmate's initial offense was erroneous. Moreover, it can now be stated unequivocally, based on *Morales*, that elimination of the inmate's mitigation hearing has absolutely no constitutional significance in and of itself, even if it amounts to a "substantial disadvantage" to the parolee. Of course, it was the elimination of this hearing which the Sixth Circuit found to be a "substantial disadvantage" precluded by the *ex post facto* clause.

Thus Petitioners submit that the Sixth Circuit's reasoning in deciding the *ex post facto* issue against the state

is in patent conflict with this Court's fundamental view of the application of the clause, as set forth in *Collins* and reaffirmed in *Morales*. Accordingly, the Court should grant certiorari, vacate the Sixth Circuit's judgment, and remand the case for reconsideration in light of *Morales*.

II. THE SIXTH CIRCUIT ERRED IN APPLYING THE EX POST FACTO CLAUSE BECAUSE THE REGULATORY CHANGE DID NOT INCREASE THE INMATES' PUNISHMENT.

The Sixth Circuit focused exclusively on the alleged "substantial disadvantage" to the inmates, and did not address the fundamental question of whether the change in parole revocation rules resulted in an increase in punishment for the inmates' initial offenses. Petitioners submit that the change does not increase in any sense the inmates' punishment; accordingly, *Morales* requires a conclusion that the Sixth Circuit erred.

In determining that the statutory amendment in *Morales* did not offend the *ex post facto* clause, the Court noted several important circumstances which indicated a procedural as opposed to substantive purpose. The evident focus of the amendment was to relieve the parole board of the burdens associated with scheduling hearings for prisoners who were not likely to obtain parole. In fact, the substantive standards for granting parole remained the same. Moreover, the Court declared that "countless changes [which] might create some speculated, attenuated risk of affecting a prisoner's actual term of confinement" could not be considered determinative for the purposes of the *ex post facto* clause.

Petitioners submit that the regulatory change involved in this case is also procedural, and has even less to do with actual punishment than the statutory amendment in *Morales*. Here there is simply no retrospective increase in punishment involved. Unlike parole eligibility rules, a change in parole revocation procedures cannot in any way increase the amount of time an inmate must serve before obtaining release on parole. In fact, in this case the court below purports to bar application of the new procedure to inmates who have already been paroled and who have forfeited that parole by a new conviction. Also, the change in the rule does not, in and of itself, have any retrospective effect on the an inmate's initial sentence. Rather, it is the prisoner's subsequent conviction for an offense committed while on parole which occasions the parolee's return to prison. Moreover, the substantive standards for determining whether parole should be revoked were not altered by the rule change. Indeed, even under the old rule, inmates who were convicted of crimes committed while on parole were conclusively presumed to be parole violators.[4] In sum, the change involved here is indeed procedural, and does not involve a purpose to effect or increase the inmates' actual incarceration for their initial offenses.

More importantly, the rule's elimination of a mitigation hearing for the inmates, while foreclosing the opportunity for immediate continuation on parole, nevertheless has only the most speculative and attenuated possible effect on the inmates' actual terms of confinement. It cannot be said that at the time of the inmates' initial convictions, the calculation of the length of sentence is

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[4]Respondents argued from the outset that the PVR revocation process under the old rule resulted in the revocation of parole in every case in which the PVR was found to have been convicted of a felony while on parole.

dependent upon an expectation of a discretionary parole revocation hearing at some future date. To argue otherwise is to suggest that at the time of sentencing, prisoners anticipate that they will achieve parole, commit other offenses while on parole, but nevertheless be able to convince the parole authorities at a discretionary hearing to continue them on parole. Further, revocation of the inmates' parole cannot in and of itself be considered an *increase* in the inmates' actual confinement, insofar as they have enjoyed a previous release on parole, and were on notice, prior to the commission of their parole violations, that felony convictions would result in revocation without a mitigation hearing.

In sum, the Sixth Circuit's holding in this case cannot be sustained on the merits in light of *Morales*. Petitioners therefore ask in the alternative that a writ of certiorari to review the case be granted.

CONCLUSION

For all the foregoing reasons, Petitioners submit that a writ of certiorari should therefore be issued to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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May 30, 1995

No. 93-4287

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLENN S. KELLOGG; Lani R. Smith; Lawrence Dessenberg; John Stamper; Michael Jones; Robert Donley; Daniel Schreiber; and Michael Karhoff, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

JOHN W. SHOEMAKER, et al.,
Defendants-Appellees

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed January 9, 1995

Before: Keith, Wellford, and Daughtrey, Circuit Judges. Harry W. Wellford, Circuit Judge. Glenn S. Kellogg ("Kellogg"), an Ohio prison inmate, initiated a 42 U.S.C. § 1983 class action suite in 1990 seeking declaratory and injunctive relief with respect to certain Ohio parole revocation procedures.

This case began in federal court in August 1990, when Kellogg[5] filed a pro se complaint alleging, under 42 U.S.C. § 1983, that the Ohio Parole Revocation procedures violated his procedural due process rights. The Ohio public defender, who began representing Kellogg, moved to certify a class to challenge certain parole revocation procedures. The district court certified the class to include "all persons who parole was, or will be, revoked by the Ohio Adult Parole Authority through a so-called parole violator recommissioned hearing because they have been convicted of a new felony committed while on parole."

The provisions of Ohio law now under attack are the new "emergency" provisions that the Ohio Adult Parole Authority ("agency") enacted effective September 1, 1992. Originally, the class brought its action against the older repealed provisions, which were discretionary and would have required Ohio to provide parolees with a "meaningful" hearing prior to revoking their parole.[6] Under these old regulations, a parolee convicted of a subsequent crime in Ohio, while on parole, was conclusively presumed to be in violation of his parole. The parolee under the old regulations, however, was entitled to a hearing to present any relevant mitigating circumstances. Although plaintiff parolees seem to concede they were given a "hearing" under the old regulations, they argued that it did not meet the procedural requirements that *Morrisey v. Brewer*, 408 U.S.

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[5]Kellogg's probation had been revoked after he was convicted of new felonies (Attempted Grand Theft, Possession of Criminal Tools, Breaking and Entering, and Drug Abuse with prior drug law (conviction) while on parole.

[6]Section 5120:1-1-19(1) provided: "In the event a releasee is convicted and sentenced on a new felony under Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 has been violated."

471 (1972), required. The district court agreed with their argument, holding that the parolees did not receive sufficient notice, were denied the assistance of counsel, and were not permitted to call or to subpoena witnesses.

The agency then repealed the old regulations and implemented new ones. The new regulations did away with any type hearing if the defendant was convicted by an Ohio court "for an offense he committed while on any release granted by the Adult Parole Authority..." There would no longer be a hearing to determine mitigating circumstances surrounding the revocation. The only process the parolees would receive would be the parole authority's verification "that the sentence was imposed for an offense that occurred while the prisoner was under release status."

The agency revised the parole procedures to eliminate any agency's discretion in deciding whether to revoke parole. *See Black v. Romano*, 471 U.S. 606, 105 S. Ct. 2254 (1985), which had indicated that the hearing procedures required in *Morrisey* were applicable only if the parole board exercised discretion in revoking parole. *See also Snead v. Donahue*, 993 F.2d 1239 (6th Cir. 1993); *Harrison v. Parke*, 1990 WL 170428 (6th Cir.).

The district court then granted summary judgment in favor of the agency, sustaining its reliance on the amended regulation. The district court held that the new policy rendered the plaintiffs' challenges moot. The district court refused to amend its judgment and refused to grant plaintiffs any relief. The district court discussed rejecting the merits of the plaintiffs' constitutional challenges to the new regulations.

Plaintiffs appeal in order to challenge the district court's holding that the change in the parole procedures

rendered the plaintiffs' constitutional challenges moot. Plaintiffs contend that the agency violated its rule-making powers by adopting the new procedures. Plaintiffs also argue that this court should reconsider *Sneed v. Donahue*, which held that a parole board was not required to provide the parolee with a hearing if the board exercised no discretion in revoking parole. Last, they wish to challenge the constitutionality of the new regulations, arguing that the change of the parole procedures in this respect constitutes a violation of the *ex post facto* clause.

I.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 since there is an appeal from a final order of the district court. The appropriate standard of review is *de novo* because the appeal concerns issues of law.

II.

MOOTNESS

There is some confusion as to whether the district court held that the plaintiffs' constitutional challenges to the *new* procedures were moot. The district court discussed the constitutional merits of the plaintiffs' arguments, but refused to amend the court's judgment dismissing the claims of plaintiffs:

> Plaintiffs now seek to amend this Court's judgment, arguing that the application of OAC § 5120:1-1-21 to members of the plaintiff class whose parole had been revoked under

> the old regulation violates the constitutional prohibition against *ex post facto* laws...As this court ruled in its *Opinion and Order* entered May 27, 1993, the relevant analysis turns to whether or not plaintiffs' claims for relief are moot. Plaintiffs' sole claim for injunctive relief sought to restrain defendants from violating plaintiffs' procedural due process rights in the future through the use of constitutionally infirm PVR hearing or procedures. Plaintiffs no longer have any procedural due process rights to a meaningful hearing in connection with felonies committed after the effective date of the new regulation. Accordingly, the enactment of OAC § 120:1-1-21 has rendered plaintiffs' claims for future injunctive relief moot.

The plaintiffs do not contest the mootness of their challenges to the original procedures.[7] Plaintiffs argue, however, that they should be allowed to challenge the constitutionality of the new parole procedures.

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[7]It is apparent that the changes in the parole procedure rendered the plaintiffs' challenges to the original procedures moot. There is no need for this court to issue an injunction when the parole board has voluntarily changed its allegedly unconstitutional practices. *See Cotton v. Mansour*, 863 F.2d 1241, 1244-45 (6th Cir. 1988), *cert. denied*, 493 U.S. 1042 (1990)(refusing to enjoin a social service agency's calculation of food stamp eligibility after the agency changed its practice to comply with federal regulations because "[t]here was simply no ongoing violation...to enjoin"). *See also* Corey C. Watson, Comment, *Mootness and the Constitution*, 86 Nw. U.L.Rev. 143, 147 (1991). Any remedy that a member of the class has for the unconstitutional application of the old parole procedures must, in the future, be obtained through habeas corpus.

We note that considerable controversy surrounds the mootness doctrine after *Honig v. Doe*, 484 U.S. 305 (1988). One rationale holds that the mootness doctrine is fundamentally tied to the case and controversy language of Article III, and, therefore, the court may only review if there is a justiciable issue. Another view is that the mootness doctrine is more flexible, and may be used to accomplish prudential concerns to avoid the squandering of judicial resources after the decisional process is underway. *See* Corey C. Watson, *Mootness and the Constitution*, 86 Nw U.L. Rev. at 143.

Under either rationale, the plaintiffs' challenge to the new procedures are not moot. The parole authority may not be allowed to abort or delay constitutional review of the parole procedures by substitution of a new procedure on the eve of adjudication. Prudential concerns also require us to hear this case rather than to dismiss it as moot as to those plaintiffs who are alleged to have committed offenses and had their paroles revoked prior to September 1, 1992. We conclude that a "case or controversy" exists, and that plaintiffs have raised proper concerns about the regulations' constitutionality as applied to offenses which occurred prior to the date of the amendment.

III.

DISCUSSION

A. Whether the agency violated its rule-making authority by adopting the new parole revocation procedures?

The plaintiffs make two arguments in this respect. First, the plaintiffs argue that parole authority only has power to make administrative rules and not broad legislative

policy rules. Second, the plaintiffs argue that even if the parole authority has the power to make broad policy rules, the new regulations conflict with Ohio statutes.

The plaintiffs' first argument is unavailing. The Ohio parole authority is charged with administering all statutes relating to parole, *see* O.R.C. § 2967.02, including determining whether a convict has violated parole. O.R.C. § 2967.15. The parole authority has a long history of making regulations governing parole revocation. It should be noted that the plaintiffs did not contest the authority's power to issue the old regulations; they only challenged the *application* of the old regulations, arguing that a hearing to present mitigating circumstances was not a "meaningful hearing."

Second, plaintiffs argue that the new parole revocation procedures are inconsistent with § 2967.15 of the Ohio Code, which requires that a parolee be given an individual parole revocation hearing when a *parole officer* has begun the parole revocation hearing on his own initiative. This case, however, does not involve a situation in which the parole officer has begun the parole revocation proceedings on his own initiative, or based on his charge or conduct, which has not resulted in a conviction.[8] Instead, this case is governed by a different provision of § 2967.15.

The legislature has *not* specifically required an individual hearing when the basis for the parole revocation is a subsequent conviction. The statute provides only: "A convict who has been conditionally pardoned or a prisoner who has been paroled, and who, in the judgment of the adult parole authority, has violated the condition of his, pardon or

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[8]The parole authority does conduct an individual hearing in these circumstances.

parole shall be declared a violator." O.C.R. § 967.15. Thus, the agency can "declare" a parolee to have been convicted of a subsequent violation while on a parole to be a "violator" either by administrative rule or through an individual hearing. The agency has chosen to address these cases by administrative rule, which is logical as those parolees who have been *convicted* of another felony while on parole have already had a trial or hearing to determine whether they actually committed the offense charged.[9] The agency has also concluded, by administrative rule, that no mitigating circumstances would overcome a subsequent conviction of another felony committed while on parole; thus, an individual hearing would be unnecessary. The agency's conclusion is a permissible one, as we have articulated previously in *Sneed v. Donahue*, 993 F.2d 1239 (6th Cir. 1993). We find no merit, therefore, in plaintiffs' contentions in this regard.

B. *Whether this court should reconsider its decision in Sneed v. Donahue.*

Alternatively, plaintiffs ask us to reconsider our decision in *Sneed v. Donahue*, 993 F.2d 1239 (6th Cir. 1993), in which we upheld the constitutionality of the Kentucky Parole statutes that eliminated any hearing on parole violation if the parolee was convicted of a new felony while on parole. The Kentucky and proposed Ohio parole revocation statutes are identical in that each statute eliminates agency discretion and directs revocation when a parolee has been convicted of a subsequent violation while on parole.

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[9]Even under the old regulations, the parolee did not receive an individual hearing on every issue, because he was conclusively presumed to be a parole violator if he had been convicted of another felony while on parole. The only issue at the hearing was whether mitigating circumstances warranted leniency in revoking his parole.

We held in *Sneed* that the parolee "had no clearly established right to a parole revocation hearing" once a subsequent parole violation conviction had been established and the law gave the parole agency no authority to consider further mitigating factors.

> The Supreme Court in *Morrissey [v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972)] clearly instructed that the purpose of a final revocation hearing is to give the parolee an opportunity to present facts challenging the determination that he has violated a condition of parole and to present all circumstances surrounding the violation to the parole authority so that it may exercise *its discretion* in a fully informed manner. In this case, however, a revocation hearing would serve no such purposes. It is undisputed that Sneed violated a condition of his parole and has met all the factual predicates required by Ky. Rev. Stat. § 439.352 before that section can be applied to him. In addition, it would be pointless for him to present mitigating circumstances to the Board since the Board has no *discretion* in determining whether to revoke his parole status...

Sneed, 993 F.2d at 1243 (emphasis in original). Our conclusion in *Sneed* is supported by *Black v. Romano*, 471 U.S. 606, 612, 105 S.Ct. 2254, 2258, 85 L.Ed.2d 636 (1985), in which the Supreme Court stated that

> [n]either *Gagnon [v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756] nor *Morrisey* considered a revocation proceeding in which the factfinder was required by law to order incarceration

> upon finding that the defendant had violated a condition of probation or parole. *Instead, those cases involved administrative proceedings in which revocation was at the discretion of the relevant decision maker.* Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the factfinder in a revocation proceeding must, as a matter of due process, be granted discretion to continue probation or parole.

Thus, *Black* teaches that *Morrissey* does not require that a parole authority be given discretion regarding when to revoke a parolee's parole status; rather, it simply requires that when such discretion is given, a revocation hearing is required. *Sneed*, 993 F.2d at 1243, 1244.

As pointed out also in *Sneed,* two other court have reached this same result: *United States v. Cornog*, 945 F.d 1504 (11th Cir. 1991); *Pickens v. Butler*, 814 F.2d 237 (5th Cir.),*cert. denied*, 484 U.S. 924 (1987). We have no occasion (or authority) to revisit *Sneed,* and we decline plaintiffs' invitation to do so. Plaintiffs have, accordingly, shown no due process violation by the amended procedure adopted by defendants in Ohio. This procedure would apply to all situations in which a party or parolee was convicted of an offense after September 1, 1992.

C. *Whether the new parole regulations violate the ex post facto clause of the United States Constitution.*

As to the *ex post facto* challenge, we have considered this challenge in two non-binding parole guideline cases: *Persky v. Edwards*, 1986 WL 16754 at *3 (6th Cir.); *Ruip*

v. United States, 555 F.2d 1331, 1335 (6th Cir. 1977). This case, by contrast, involves binding regulations that are mandatory after September 1, 1992, and eliminates any discretion in the parole agency to consider mitigating circumstances. To establish the claimed *ex post facto* violation, plaintiffs must establish that the regulation at issue (1) is retroactive in its application, and (2) "must disadvantage the offender affected by it." *Miller v. Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)). *See also Dale v. Haeberline*, 878 F.2d 930, 935 (6th Cir. 1989), *cert. denied*, 494 U.S. 1058 (1990). In this case, the agency action in amending the pertinent regulation has the same effect as legislation for the purpose of *ex post facto* consideration.

The focus in determining whether a new law violates the *ex post facto* clause is the time the offense was committed. *Weaver*, 450 U.S. at 31, 101 S.Ct. at 965. *See also Persky v. Edwards*, 1986 WL 16754 (6th Cir.)(quoting *Forman v. McCall*, 709 f.2d 852, 859 (3d Cir. 1983)). ("[I]t is a fundamental principle of ex post facto jurisprudence that a court entertaining an ex post facto claim must focus upon the law in effect at the time of the offense for which a person is being punished."); *Rodriquez v. United States parole Comm'n*, 594 F.2d 170, 176 (7th Cir. 1979)("[A]lthough parole eligibility is determined as of the date of sentencing for some purposes...the ex post facto clause looks to the punishment annexed at the time the crime was committed.").

Next we look to whether the new regulations are more onerous than the regulations in effect at the time this subclass committed their initial crime. The defendants, relying on *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290 (1977), argue that the change is merely a procedural change, and does not affect the substantive rights of the plaintiff class. *See Dobbert*, 97 S.Ct. at 2298 ("Even though it may

work to the disadvantage of a defendant, a procedural change is not ex post facto."). Although the distinction between substance and procedure might sometimes be elusive, "a change in the law that alters a substantial right can be ex post facto 'even if the statute takes a seemingly procedural form.'" *Miller v. Florida*, 482 U.S. at 433, 107 S.Ct. at 2453. Although the change here involves a procedural matter--the right to a hearing on revocation of parole--it still affects substantive rights attendant to parole revocation. Under the old regulations, parole would be revoked for the full amount of time unless the inmate could convince the parole authority that mitigating circumstances warranted mercy. Under the new procedures, there is no opportunity to present these mitigating circumstances. This procedural change affects *substantive* rights.

Thus, the new regulations may violate the *ex post facto* clause for a portion of the plaintiff class wherein described. The plaintiff class in this case has been denied broadly to include: "all persons whose parole was, or will be revoked by the Ohio Adult Parole Authority through a so-called parole-violator recommissioned hearing because they have been convicted of a new felony committed while on parole." Obviously, the new regulations cannot be deemed to be an *ex post facto* violation as to those inmates whose paroles were revoked after a hearing under the old regulations, because the new parole regulations were not applied to them. Likewise, the statute is not *ex post facto* as to those who committed their "initial crime"[10] after the date of enactment (September 1, 1992). The district court's opinion, however, does not take into account those plaintiffs who committed their initial crime before the new regulations

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[10]We use the term "initial crime" to refer to the crime from which the inmate has been paroled. It does not refer to the subsequent violation while on parole.

came into effect but whose parole revocation proceedings will be governed by the new regulations.[11] The new regulations are retroactive only to these members of this class.[12]

To the extent any plaintiff falls into this designated category, he is entitled under the old regulations to a meaningful hearing as described in *Morrisey v. Brewer*, 408 U.S. 471 (1972). We may only provide prospective injunctive relief in this present case to those inmates, if any, who had committed their initial crime prior to September 1, 1992, and whose parole may be revoked under the new regulations. Only these plaintiffs have a claim to injunctive relief.

IV. *CONCLUSION*

In summary, we AFFIRM the district court in all respects, except as to those prisoners, if any, who committed initial offenses and also a parole violation offense conviction prior to September 1, 1992, but whose parole revocation procedures will be governed by the new regulations. Likewise, we *REMAND* the *ex post facto* claim for the district court to provide prospective injunctive relief as to those limited members of the plaintiff class described in this opinion.

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[11]The district court concluded that the "defendants have not retroactively applied [the new regulations] to the subclass of plaintiffs whose parole had been earlier revoked..."

[12]An oral argument, the Ohio Attorney General's office stated that there had been no such actions taken.

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95 MAR 22 PM 2:46 U.S. DISTRICT COURT
SOUTHERN DIST. OHIO EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GLENN S. KELLOGG, et al.,
Plaintiffs,

v. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,
Defendants.

ORDER

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit.

Consistent with the mandate of the United States Court of Appeals for the Sixth Circuit, it is hereby ADJUDGED that application of Ohio Administrative Code §5120:1-1-21, to the extent applied to those members of the plaintiff class, if any, who committed initial offenses prior to the effective date of the regulation, *i.e.*, September 1, 1992, but whose parole revocation procedures are conducted after September 1, 1992, constitutes an *ex post facto* law and its application to such persons is hereby ENJOINED. Those class members who committed their initial crime before September 1, 1992, but whose parole revocation proceedings are conducted after September 1, 1992, are entitled to the

pocedural safeguard outlined in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Moss v. Patterson*, 555 F.2d 137 (6th Cir.) *cert. denied, sub nom. Kette v. Moss*, 434 U.S. 873 (1977).

The Clerk shall enter final judgment accordingly.

Sandra S. Beckwith, Judge
United States District Court

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93 OCT 22 PM 12:21 U.S. DISTRICT COURT
SOUTHERN DIST. OHIO EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GLENN S. KELLOGG, et al.,

Plaintiffs,

v. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,

Defendants.

OPINION AND ORDER

Plaintiffs, a class of inmates whose parole was revoked by the Ohio Adult Parole Authority ["APA"], brought this action on behalf of themselves and of a class of plaintiffs, for prospective declaratory and injunctive relief pursuant to 42 U.S.C. §1983, alleging that defendants denied them procedural due process under the Fourteenth Amendment during the course of plaintiffs' revocation proceedings. On May 27, 1993, this Court granted summary judgment in favor of defendants. *Opinion and Order of May 27, 1993.* Final judgment was entered on May 28, 1993. This matter is now before the Court on plaintiffs' motion to alter or amend that judgment, Rule 59(e), Fed. R. Civ. P., and on plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order denying plaintiffs' Rule 16(f) motion for sanctions against defendants. Rule 72, Fed. R. Civ. P.

The plaintiff class consists of parolees who were convicted of a subsequent felony while on parole, and whose parole was subsequently revoked as a parole violator recommissioned ["PVR"]. Plaintiffs originally claimed that their PVR hearings failed to comport with procedural due process. They asked that the Court declare that defendants' PVR procedures violated plaintiffs' procedural due process rights, *Second Amended Complaint*, and enjoin defendants from following PVR procedures violative of plaintiffs' procedural due process rights. *Id.*

During the course of this litigation, Ohio Administrative Code ["OAC"] §5120:1-1-19(A)(1), the former administrative regulation dealing with PVR procedures, was repealed and OAC §5120:1-1-21 was implemented. After evaluating this new regulation by reference to *Black v. Romano*, 471 U.S. 606 (1985), this Court concluded that OAC §5120:1-21, which divested the Ohio Adult Parole Authority ["APA"] of all discretion regarding the revocation of a PVR's parole, is constitutional. *Opinion and Order of May 27, 1993. See also Sneed v. Donahue*, 993 F.2d 1239, 1243 (6th Cir. 1993). The Court further held that, because the procedures challenged in the second amended complaint were no longer in effect, the case has been rendered moot. *Opinion and Order of May 27, 1993.* Final judgment for defendants was entered on May 28, 1993.

Plaintiffs now seek to amend this Court's judgment, arguing that the application of OAC §5120:1-1-21 to members of the plaintiff class whose parole had been revoked under the old regulation violates the constitutional prohibition

against *ex post facto* laws. *See Article I, Section 10, Untied States Constitution.*[13]

In order to demonstrate a violation of the *ex post facto* clause contained in the United States Constitution, plaintiffs must establish that the law at issue 1) is retroactive in application and 2) "must disadvantage the offender affected by it." *Miller v. Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)); *Dale v. Haeberlin*, 878 F.2d 930, 935 (6th Cir. 1989), *cert. denied*, 494 U.S. 1058 (1990). The new regulation has not been applied to remedy any defect in the revocation procedures followed in the past. Accordingly, defendants have not retroactively applied OAC §5120:1-1-21 to the subclass of plaintiffs whose parole had been earlier revoked pursuant to former OAC §5120:1-1-19(A)(1). Defendants cannot, and do not, argue that this subclass of plaintiffs will be subjected to OAC §5120:1-1-21. Accordingly, plaintiffs have failed to establish an *ex post facto* violation in this action.

As this Court ruled in its *Opinion and Order* entered May 27, 1993, the relevant analysis turns to whether or not plaintiffs' claims for relief are moot. Plaintiffs' sole claims for injunctive relief sought to restrain defendants from violating plaintiffs' procedural due process rights in the future through the use of constitutionally infirm PVR hearings or procedures. Plaintiffs no longer have procedural due process rights to a meaningful hearing in connection with PVR parole revocation proceedings in connection with felonies committed after the effective date of the new regulation. Accordingly, the enactment of OAC §5120:1-1-

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[13]The Eleventh Amendment prevents this Court from considering claims under Ohio's Constitution. *See Pennhurst State School and Hospital v. Haldeman*, 465 U.S. 89 (1984).

21 has rendered plaintiffs' claims for future injunctive relief moot.

Plaintiffs assert that their claims or declaratory relief are not rendered moot by the enactment of OAC §5120:1-1-21. This Court disagrees. Where the plaintiffs "seek[] a declaratory judgment as to [the Parole] Board's past actions -- without any substantive relief involved -- neither the Declaratory Judgment Act standard (28 U.S.C. §2201) nor Article III's 'case' or 'controversy' requirement is satisfied." *Jackson v. Illinois Prisoner Review Board*, 657 F.Supp. 823, 827 (N.D. Ill. 1987), *aff'd in part and rev'd in part*, 856 F.2d 890 (7th Cir. 1988) (citing *Green v. Mansour*, 474 U.S. 64 (1985); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). To hold otherwise would constitute "an end run around habeas corpus procedures." *Foster v. Kassulke*, 898 F.2d 1144, 1148 (6th Cir. 1990). Declaratory relief evaluating the constitutionality of past procedures would be the functional equivalent of a habeas corpus action, and is not available in an action under 42 U.S.C. §1983. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973).

Plaintiffs also disagree with this Court's rejection of their argument that defendants "exceeded their rule-making authority" when OAC §5120:1-1-21 was enacted. *Plaintiffs' Motion to Alter or Amend May 28, 1993 Order*, p. 15. This Court expressly held that "OAC §5120:1-1-21 is a valid exercise of rule-making authority and serves to divest individual APA panels of discretion whether or not to revoke a PVR's parole." *Opinion and Order of May 27, 1993*, at 12. Plaintiffs' motion to alter or amend fails to persuade this Court that the judgment of May 28, 1993 was entered in error in this regard.

Finally, plaintiffs object, pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, to Magistrate Judge King's

denial of plaintiffs' Rule 16(f) motion for sanctions against defendants. Notwithstanding plaintiffs' claims to the contrary, this Court concludes that Magistrate Judge King's conclusions that the circumstances in this action do not justify an award of fees or the preclusion of relevant evidence is neither clearly erroneous nor contrary to law. Accordingly, plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order are OVERRULED.

WHEREUPON plaintiffs' motion to alter or amend this Court's judgment of May 28, 1993 is without merit, and it is therefore DENIED. Plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order denying sanctions against defendants are without merit, and they are therefore OVERRULED.

Sandra S. Beckwith, Judge
United States District Court

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93 MAY 27 PM 1:14 U.S. DISTRICT COURT
SOUTHERN DIST. OHIO EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GLENN S. KELLOGG, et al.,
Plaintiffs,

v. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,
Defendants.

OPINION AND ORDER

Plaintiffs, inmates whose parole has been revoked by the Ohio Adult Parole Authority ["APA"], bring this action on behalf of themselves and of a class of plaintiffs for prospective declaratory and injunctive relieve pursuant to 42 U.S.C. §1983, alleging that defendants denied them procedural due process under the Fourteenth Amendment during the course of their final parole revocation proceedings. This matter is now before the Court on the parties' cross-motions for summary judgment.

The plaintiff class is composed of parolees whose parole has been or will be revoked because they have been convicted of a subsequent felony committed while on parole. Referred to by the APA as Parole Violator Recommissioned

["PVR"], each inmate was provided a final parole revocation hearing. The regulation governing those hearings, Ohio Administrative Code ["OAC"] §5120:1-1-19(A)(1), provided that the subsequent felony conviction creates a conclusive presumption that the inmate has violated his parole, and that the scope of the final revocation hearing would be strictly limited to the issue of mitigation.[14] Plaintiffs claim that their procedural due process rights have been abridged in several respects by the manner in which their PVR hearings were held. Plaintiffs and defendants have filed motions for summary judgment.

Summary judgement is governed by Rule 56 of the Federal Rules of Civil Procedure, which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

"[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an

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[14]OAC §5120:1-1-19(A)(1) provides:

> In the event a releasee is convicted and sentenced on a new felony under the Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 [providing that all conditions of parole include a requirement that the parolee abide by all federal, state and local laws] has been violated. In such cases, as applicable, the parole revocation hearing will be confined to the determination of mitigating circumstances.

otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); *Kendall v. The Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984).

The standard to be applied by the Court on motion for summary judgment mirrors the standard for a directed verdict.

Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986); *Anderson*, 477 U.S. at 250.

> The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted. *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983). In essence, thought, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Id. at 251-52. Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules which are designed "to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Rule 1 of the Federal Rules of Civil Procedure).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence

submitted] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (footnote omitted); *accord*, *Adams v. Union Carbide Corp.*, 737 F.2d 1453, 1455-56 (6th Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985). Inferences to be drawn from the underlying facts contained in such materials must be considered in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Watkins v. Northwestern Ohio Tractor Pullers Association, Inc.*, 630 F.2d 155, 158 (6th Cir. 1980). Additionally, "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. *Adickes*, 397 U.S. at 157-60; *Smith v. Hudson*, 600 F.2d 60, 65 (6th Cir.), *cert dismissed*, 444 U.S. 986 (1979).

If the moving party meets its burden and if adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 326. The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. *Anderson*, 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 WALL. 442, 448 (1872)). As is provided in Fed. R. Civ. P. 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for

> trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

Thus, "a party cannot rest on the allegations contained in his...[pleadings] in opposition to a properly supported motion for summary judgment against him." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 259 (footnote omitted).

The process due parolees charged with violating conditions of their parole has changed over time. The United States Supreme Court first held, in *Morrisey v. Brewer*, 408 U.S. 471 (1972), that a parolee's "liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." *Id.*, 408 U.S. at 482.

First, the Supreme Court held, a parolee is entitled to prior notice and a reasonably prompt informal inquiry, conducted by an impartial hearing officer, to determine if there is reasonable ground to believe that the arrested parolee has violated a parole condition. At this preliminary revocation hearing, the parolee is entitled to present relevant information and to question adverse witnesses unless security considerations indicate otherwise. The neutral hearing officer must summarize the evidence and state the reasons for his decision. *Id.*, 408 U.S. at 484-87.

If probable, or reasonable, cause is found to believe that the parolee has violated one or more conditions of his parole, the parolee is then entitled to a final revocation proceeding before a neutral and detached hearing body. The parolee must have been given written notice of the claimed violations and must be advised of the evidence against him. He may be entitled to counsel and must be afforded an

opportunity to be heard in person and to present witnesses and documentary evidence. He also has the right to confront and examine adverse witnesses unless security considerations militate against this. A written statement of the evidence relied on and reasons for revoking parole must be provided. *id.*, 408 U.S. at 487-90. *See also Gagnon v. Scarpelli*, 411 U.S. 778 (1973) [extending the same due process protections to persons charged with violating conditions of probation].

Thereafter, the United States Court of Appeals for the Sixth Circuit commented that, "The automatic revocation of parole for every parole violation, regardless of the mitigating circumstances, clearly runs counter to the dictates of ... *Morrissey v. Brewer.*" *Preston v. Piggman*, 496 F.2d 270, 275 n.1 (1974). The Court held specifically in *Moss v. Patterson*, 555 F.2d 137 (6th Cir.), *cert. denied sub nom. Kette v. Moss*, 434 U.S. 873 (1977), that a final revocation proceeding consistent with the dictates of *Morrissey v. Brewer* must be afforded even parolees convicted of a subsequent felony.

Plaintiffs in this case challenge the constitutional sufficiency of the final revocation proceedings afforded to PVRs in Ohio under OAC §5120:1-19(A)(1). The evidence currently before the Court indicates that hearings held at the correctional institution before the parole panel pursuant to O.A.C. §5120:1-1-19(A)(1) failed to provide to PRVs notice sufficient to enable them to marshall witnesses or other information for presentation in mitigation. Moreover, PVRs are denied the assistance of counsel and are not permitted to call or to subpoena witnesses to testify on their behalf at the final hearing. Although documentary evidence submitted in mitigation by the PVR will ordinarily be accepted by the parole panel, the panel does not take into account such information in determining whether or not the PRV's parole status should be revoked. Finally, the parole panels exercise

no discretion in whether or not to revoke the PVR's parole. In this regard, the prevailing view among state officials is that parole panels have no discretion to take any action other than revocation of parole until after the minimum term of imprisonment on the new felony conviction has been served.

Defendants contend, first, that the procedures followed under OAC §5120:1-1-19(A)(1) do not contravene any constitutional dictates because PVRs, who are already in custody on the new conviction, do not in fact qualify as parolees. Accordingly, defendants argue, no action taken by parole officials can result in the deprivation of the PVRs' liberty. This argument is specious.

The United States Court of Appeals for the Sixth Circuit has specifically recognized that PVRs in Ohio are entitled to a final revocation hearing consistent with *Morrissey* and *Gagnon*. *Inmates' Councilmatic Voice v. Rogers*, 541 F.2d 633 (6th Cir. 1976). Moreover, *Moody v. Daggett*, 429 U.S. 78 (1976), made clear that a parolee's incarceration on an entirely new charge is not co-extensive with the revocation of his parole. Finally, it is indisputable that the actual result of the final parole revocation hearing is the panel's revocation of the PVR's parole.

Defendants have now, however,substituted OAC §5120:1-1-19 (A)(1) with OAC §5120:1-1-21, which provides, in pertinent part:

> (A) The Adult Parole Authority *shall revoke* the release of any releasee who is recommitted to the Department of Rehabilitation and Correction to serve a sentence imposed upon him by any court in Ohio for an offense he committed while on any release granted by the Adult Parole Authority or while serving a period of intermediate transitional detention

> pursuant to Rule 5120-11-12 of the Administrative Code or serving a period of parole supervision pursuant to Rule 5120-11-19 of the Administrative Code.
>
> (B) This revocation shall be accomplished by the issuance of minutes by the Adult Parole Authority after it has been verified that the sentence was imposed for an offense that occurred while the prisoner was under release status (emphasis added).

Thus, unlike former OAC §5120:1-1-19(A)(1), the currently controlling regulation, OAC §5120-1-1-21, no longer allows the APA any discretion as to whether or not to revoke the parole of a PVR. The revocation is effected simply upon verification by the APA that the PVR has been convicted of another criminal offense committed while on parole, and the declaration of revocation by the APA by means of the "issuance of minutes."

In *Black v. Romano,* 471 U.S. 606 (1985), the United States supreme Court distinguished statutory or regulatory schemes that vested discretion in a parole authority in the revocation process from those that did not:

> [N]either *Gagnon* nor *Morrissey* considered a revocation proceeding in which the factfinder was required by law to order incarceration upon finding that the defendant had violated a condition or probation or parole. Instead, those cases involved administrative proceedings in which *revocation was at the discretion of the relevant decisionmaker.* (citations omitted). Thus, the Court's discussion of the importance of the informed

> exercise of discretion *did not amount to a holding that the factfinder in a revocation be granted discretion to continue probation or parole* (emphasis added).

Id., 471 U.S. at 612. As a result, what had been perceived to be an unconditional right to a parole revocation hearing with certain due process safeguards now seems to turn on whether or not discretion is reposed in the factfinder.

All of the judicial authority after *Black v. Romano* has held that, if the decisionmaker retains any discretion in determining whether or not parole should be revoked, the procedural safeguards of *Morrissey* must be followed. On the other hand, if discretion is lacking and the revocation of parole is automatic once the fact of a subsequent conviction is established, a parolee is afforded no further due process safeguards and, indeed, no revocation hearing. *Pickens v. Butler,* 814 F.2d 237, 239 (5th Cir.), *cert. denied*, 484 U.S. 924 (1987); *Alevras v. Neubert*, 727 F.Supp. 852, 853-54 (D.D. N.Y. 1990); *Witzke v. Withrow*, 702 F.Supp. 1338, 1351 (W.D. Mich. 1988). *See also United States v. Cornog*, 945 F.2d 1504, 1512-13 (11th Cir. 1991). The operative question here, then, is whether Ohio currently vests any discretion in the parole panel in determining whether or not a PVR's parole will be revoked. The plaintiff class contends that Ohio law does. Specifically, plaintiff argue that the parole board may effectively continue parole simply "[b]y not verifying the facts or by not issuing the minutes, or by delaying either act, ..." *Plaintiffs' Reply to Defendants' Memorandum Contra Plaintiff Class' Motion for Summary Judgment*, at 12. *See also United States v. Cornog*, 945 F.2d 1504. However, this argument ignores the specific language of OAC §5120:1-1-21(A), which requires that the APA "*shall revoke* the release" of any parolee recommitted to the Ohio Department of Rehabilitation and Correction to

serve a sentence imposed upon him for an offense committed while on parole (emphasis added.)

Plaintiffs also contend that, regardless of OAC §5120-1-21, the APA is vested with discretion by virtue of O.R.C. §2967.17, which provides:

> The adult parole authority may,in its discretion, grant an administrative release:[15]
>
> (A) To a parole violator serving another felony sentence in a penal institution within or without this state for the purpose of consolidation of the records or where justice would be best served;
>
> (B) To a parole violator at large whose case has been inactive for at least ten years following the date of declaration of parole violation.
>
> An administrative release shall not be granted except upon the concurrence of a majority of the parole board and approval of the chief of the adult parole authority and shall not operate to restore the rights and privileges forfeited by conviction as provided in section 2961.01 of the Revised Code. Any person granted an administrative release under this section may subsequently apply for a commutation of sentence for the purpose of regaining the rights and privileges forfeited by conviction.

---

[15]"Administrative release" is defined as "a termination of jurisdiction over a particular sentence by the [APA] for administrative convenience." O.R.C. §2967.01 (C).

See State v. Dean, 1986 WL 9071 (Ross Cty. App. 1986) [an Ohio parolee was administratively released from parole following his sentence to life imprisonment in another state]. The statute does not vest any discretion in the APA or its panels in connection with the revocation of a PVR's parole. Accordingly, OAC 15120:1-1-21, which does divest all discretion from the APA in this regard, is not inconsistent with this statute.

Plaintiffs also take the position that OAC 5120:1-1-21 is ineffective because it is inconsistent with Ohio statutory law. In Ohio, an agency "may not issue rules which are unreasonable or are in clear conflict with statutory enactment covering the same subject matter." *Carroll v. Department of Administrative Services*, 10 Ohio App. 3d, 108, 110 (1983). Plaintiffs take the position that OAC §5120:1-1-21, which purports to divest the APA of all discretion where the issue of revocation of PVRs is concerned, is inconsistent with ORC §2967.15, which provides, in pertinent part:

> A convict who has been conditionally pardoned or a prisoner who has been paroled, and who, in the judgment of the adult parole authority, has violated the conditions of his pardon or parole shall be declared a violator. In such case, the time from the date of the declared violation of his pardon or parole to the date he becomes available for return to the institution shall not be counted as a part of time or sentence served.

The Ohio APA is charged with administering all statutes relating parole. O.R.C. §2967.02. Read together, O.R.C. §§2969.02 and .15 reflect the General Assembly's intent to confer upon the APA the authority to determine those circumstances under which a person released on parole

should be declared a violator and returned to the institution from which he was paroled. The statutes do not require that individual members of the APA or that panels of the APA exercise that discretion in each individual case. Accordingly a regulation such as OAC §§5120:1-1-21, which expressly articulates one circumstance under which the APA will revoke a parolee's parole, is not, in the judgment of this Curt, inconsistent with ORC §2967.15.

In short, then, this Court concludes that OAC §§5120:1-1-21 is a valid exercise of rule-making authority and serves to divest individual APA panels of discretion in the decision whether or not to revoke a PVR's parole.

Because, under the new administrative regulation, individual parole panels no longer have discretion with respect to the revocation of the parole of any PVR, the due process protections afforded parolees by *Morrissey v. Brewer* are no longer applicable. *See Pickens v. Butler,* 814 F.2d 237. *See also United States v. Cornog*, 945 F.2d 1504 (11th Cir. 1991); *Black v. Romano*, 471 U.S. 606.

Defendants contend that, with the passage of the new regulation, the issues in this case have been rendered moot. Plaintiffs disagree.

The second amended complaint, filed December 9, 1992, challenges the PVR revocation procedure in place at the time the complaint was filed, alleging specifically that that procedure violated the due process rights of the members of the plaintiff class. Plaintiffs seek declaratory relief declaring that the revocation procedure is unconstitutional by virtue of the facts that that procedure fails to give members of the plaintiff class reasonable and adequate notice of the scheduling of the PVR hearing and of the PVRs' rights at the hearing, fails to provide a meaningful opportunity to present

evidence and argument as to mitigation, and prohibits the exercise of discretion by the members of the Parole Board in light of mitigating factors. *Second Amended Complaint*, at 6. The plaintiffs also seek preliminary and injunctive relief

> restraining, prohibiting, and enjoining Defendants from approving, implementing, or enforcing PVR revocation procedures which deprive Plaintiffs and all others similarly situated of their Fourteenth Amendment due process rights.

Second Amended Complaint, at 7. As this Court stated, in its October 28, 1991 Opinion and Order denying the defendants' motion to dismiss, the plaintiff class in this action seeks only declaratory and future injunctive relief enjoining the defendants from following the challenged procedures. The Court specifically noted that this action did not, and indeed could not, challenge the lawfulness of the current confinement of anymember of plaintiff class, because such an attack is properly brought only in the context of a habeas corpus action under 28 U.S.C. §2241. *See Presiser v. Rodriquez*, 411 U.S. 475 (1973). Because the procedures challenged by the second amended complaint no longer have any force or effect in the State of Ohio, this Court concludes that the issues joined by the second amended complaint and the answer thereto have, by passage of OAR §5120:1-1-21, been rendered moot. Accordingly, defendants are entitled to judgment as a matter of law.[16]

---

[16]This determination does not, of course, impact upon the right of any member of the plaintiff class to challenge, in a petition for a writ of habeas corpus, the constitutionality of his current confinement under former procedures.

WHEREUPON plaintiffs' motion for summary judgment is without merit and it is therefore DENIED. The claims asserted in the second amended complaint have been rendered MOOT by the passage of OAR §5120:1-1-21 and, for that reason, the defendants' motion for summary judgment is meritorious and it is therefore GRANTED.

The Clerk is DIRECTED to enter FINAL JUDGMENT for the defendants.

Sandra S. Beckwith, Judge
United States District Court

FILED
92 DEC 9 AM 9:54 U.S. DISTRICT COURT
SOUTHERN DIST. OHIO EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GLENN S. KELLOGG, et al.,
Plaintiffs,

v. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,
Defendants.

OPINION AND ORDER

Plaintiffs, inmates whose parole was revoked by the Ohio Adult Parole Authority ["OAPA"], bring this action on behalf of themselves and of a class of plaintiffs. Plaintiffs seek declaratory and injunctive relief, pursuant to 42 U.S.C. §1983, alleging that defendants denied them procedural due process under the Fourteenth Amendment during the course of plaintiffs' parole revocation proceedings. This matter is now before the Court on defendants' motion to reconsider this Court's prior Opinion and Order denying their motion for summary judgment. *Opinion and Order of May 12, 1992.*

Rule 54(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> [A]ny order ... which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order ... is subject to revision at any time before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Three of the representative plaintiffs[17] in this class action[18] unsuccessfully sought relief through actions in *mandamus* before the state courts prior to instituting the present action. Defendants argue that the dismissals of the *mandamus* actions serves to preclude §1983 claims asserted by those plaintiffs in this action.

The application of the doctrine of *res judicata* is determined by the effect of the prior judgment, in this case, judgments rendered by Ohio Courts. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985). In its Opinion and Order of May 12, 1992, this Court held that the Ohio Supreme Court would, if confronted with this issue, conclude that the doctrine of *res judicata* does not preclude subsequent litigation when the prior action entails a higher burden of proof. *See In re Young*, 58 Ohio St. 2d 90, 92 (1979); *Reynolds v. Ross County Children's Services Agency*, 5 Ohio St. 3d 27, 30 (1983). In Ohio, an action in *mandamus* requires the petitioner to establish the

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[17]The three representative plaintiffs are: Glenn S. Kellogg, Lani R. Smith and John Stamper.

[18]This Court also certified a class of plaintiffs in this action defined as "all persons whose parole was, or will be, revoked by the Ohio Adult Parole Authority through a ... parole-violator-recommissioned hearing because they have been convicted of a new felony committed while on parole." *Opinion and Order of July 17, 1992*, at 6.

elements of the claim by a standard of clear and convincing evidence, while the burden of proof in a §1983 action is evidence by a preponderance. Review of Ohio authority therefore led this Court to conclude that *res judicata* does not operate to bar plaintiffs' claims in this action.

This Court must, however, follow the precedent provided by the United States Court of Appeals for the Sixth Circuit. In *Childs v. Van Wert County,* Case No. 91-3118 (unpublished), (March 30, 1992),[19] the United States Court of Appeals for the Sixth Circuit held that the denial by the Ohio Supreme Court of a *mandamus* action precludes a federal §1983 action based on the same facts. In reaching its decision, the Court of Appeals borrowed heavily, as did the underlying District Court, from Seventh Circuit authority.[20] The *Childs* panel also cited with approval *Lesher v. Lavrich*, 784 F.2d 193 (6th Cir. 1986).[21] The applicability of *Childs* to this action is clear.

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[19]Although citation to unpublished opinions is disfavored in the Sixth Circuit, *See* Sixth Circuit Rule 24, the similarity of the facts in the unpublished opinion to the instant action is so great that this Court would be remiss if it did not follow this unpublished precedent.

[20]The Sixth Circuit, after quoting *Wozniak v. DuPage County*, 845 F.2d 677 (7th Cir. 1988), held that "[w]e regard the quoted language as a good summary of legal principles that would be no less applicable in Ohio than in Illinois." *Childs v. Van Wert County*, 1992 U.S. App. LEXIS 6297 at 16-17. The Court also cited a District Court opinion interpreting the doctrine of *res judicata* in Michigan. *Id.*, at 17-18 (quoting *Falk v. State Bar of Michigan*, 631 F.Supp. 1515, 1521 (W.D. Mich. 1986)).

[21]*Lesher* spoke generally of Ohio's law of *res judicata*. *Lesher* did not, however, involve a prior action that required a higher burden of proof.

Accordingly, defendants' motion for reconsideration is meritorious, and it is therefore GRANTED. Defendants are entitled to summary judgment as to named plaintiffs Glen S. Kellogg, Lani R. Smith and John Stamper, who have previously sought relief by way of an action in *mandamus* before the Ohio courts. The remaining named plaintiffs who have not availed themselves of an action in *mandamus* before the Ohio courts, Lawrence Dessenberg, Robert Donley, Michael Jones, Michael Karhoff, and Daniel Schreiber, are unaffected, and may continue the instant action.

The Court notes that the second amended complaint, leave to file which was granted on May 12, 1992, has never been filed. The Clerk is DIRECTED to file the tendered second amended complaint forthwith.

Sandra S. Beckwith, Judge
United States District Court

FILED FEB 28 1995
LEONARD GREEN, CLERK

NO 93-4287

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLENN S. KELLOGG; LANI R. SMITH; JOHN STAMPER; LAWRENCE DESSENBERG; ROBERT DONLEY; MICHAEL JONES; MICHAEL KARHOFF; DANIEL SCHREIBER, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

JOHN W. SHOEMAKER, et al.
Defenants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: KEITH, WELLFORD, and DAUGHTREY, Circuit Judges.

ORDER

The parties in this case have called the court's attention to an inconsistency in the body of our opinion filed January 9, 1995, by filing petitions for rehearing. Upon consideration, we shall revise the opinion by striking

therefrom the phrase, "and also a parole violation offense conviction" from the first sentence of "IV. *CONCLUSION,*" p. 12. We shall also strike this phrase from line three of the Judgment in this case entered January 9, 1995. Both petitions for rehearing are DENIED.

No. 93-4287
Kellogg v. Shoemaker

ENTERED BY ORDER OF THE COURT

LEONARD GREEN CLERK

(2)

NO. 94-1964

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN W. SHOEMAKER, ET AL.,
Petitioners,

v.

GLENN S. KELLOGG; LANI R. SMITH; JOHN STAMPER;
LAWRENCE DESSENBERG; ROBERT DONLEY; MICHAEL JONES;
MICHAEL KARHOFF; DANIEL SCHREIBER,
on behalf of themselves
and all others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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NO. 94-1964

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN W. SHOEMAKER, ET AL.,[1]

Petitioners,

v.

GLENN S. KELLOGG; LANI R. SMITH; JOHN STAMPER;
LAWRENCE DESSENBERG; ROBERT DONLEY; MICHAEL JONES;
MICHAEL KARHOFF; DANIEL SCHREIBER,
on behalf of themselves
and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

---

[1] Pursuant to Rule 14.1(b), the Petitioners are: John W. Shoemaker, Chief, Ohio Adult Parole Authority; Raymond E. Capots, Chairman, Ohio Parole Board; George A. Bustamante, Member, Ohio Parole Board; Owen J. Barnes, Member, Ohio Parole Board; Margarette T. Ghee, Member, Ohio Parole Board; Frederick E. Rambacher, Member, Ohio Parole Board; William E. Hudson, Member, Ohio Parole Board; Robert E. Smith, Member, Ohio Parole Board; H. Richard Gooch, Member, Ohio Parole Board; and, Gloria R. Andrews, Member, Ohio Parole Board. The Ohio Attorney General represents all the petitioners.

PETITIONERS' QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT BELOW SHOULD RECONSIDER ITS *EX POST FACTO* RULING DECIDED PRIOR TO THIS COURT'S DECISION IN *CALIFORNIA DEPARTMENT OF CORRECTIONS V. MORALES*, ___ U.S. ___, 115 S.CT. 1597 (1995).

2. WHETHER THE *EX POST FACTO* CLAUSE, AS INTERPRETED IN *CALIFORNIA DEPARTMENT OF CORRECTIONS V. MORALES*, ___ U.S. ___, 115 S.CT. 1597 (1995), PERMITS STATES TO AMEND REGULATIONS GOVERNING THE PROCEDURES UNDER WHICH PAROLE MAY BE REVOKED AND APPLY THOSE AMENDMENTS TO PREVIOUSLY SENTENCED INMATES WHO HAVE COMMITTED A NEW CRIME WHILE ON PAROLE.

OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is reported at *Kellogg v. Shoemaker*, 46 F.3d 503 (6th Cir. 1995), and is reproduced in the Appendix to this brief in opposition at A-1. The February 28, 1995 order of the Sixth Circuit Court of Appeals denying the parties' petitions for rehearing is unreported, but is reproduced in the Appendix at A-6.

The May 27, 1993 Opinion and Order of the United States District Court for the Southern District of Ohio, Eastern Division, granting Petitioners' motion for summary judgment is unreported, but is reproduced in the Appendix at A-8. The October 22, 1993 Opinion and Order of the United States District Court for the Southern District of Ohio, Eastern Division, denying Respondents' motion to alter or amend is unreported, but is reproduced in the Appendix at A-23. The March 22, 1995 Order of the United States District Court for the Southern District of Ohio, Eastern Division, enjoining Petitioners from applying § 5120:1-1-21 of the Ohio Administrative Code to members of the plaintiff class who committed initial offenses prior to the effective date of the rule, but whose parole revocation procedures are conducted after that date, is unreported, but is reproduced in the Appendix at A-28.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on January 9, 1995. The Order denying rehearing was entered on February 28, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Art. I, Section 10

No State shall ... pass any ... ex post facto Law ... .

STATEMENT OF THE CASE

A. PROCEDURAL POSTURE

On August 15, 1990, Respondent Glenn S. Kellogg, an Ohio prison inmate, initiated this 42 U.S.C. § 1983 class action seeking declaratory and prospective injunctive relief with respect to certain parole revocation procedures. He alleged that Ohio's procedure for revoking the parole of parolees who are convicted of a new felony committed while on parole (referred to as "parole violators recommissioned" or "PVRs") violated his procedural due process rights under *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); and *Moss v. Patterson*, 555 F.2d 137 (6th Cir.), *cert. denied sub nom. Kette v. Moss*, 434 U.S. 873 (1977). Kellogg's claims invoked the court's jurisdiction under 28 U.S.C. § 1343.

Kellogg subsequently secured counsel who filed an amended complaint and moved to certify a class. The District Court certified the class to include "persons whose parole has been or will be revoked because they have been convicted of a subsequent felony committed while on parole." May 27, 1993 Opinion and Order, 1. After closure of discovery and the filing of motions for summary judgment, the District Court granted Petitioners leave to supplement the record with evidence that they had enacted an administrative rule which authorizes the summary revocation of parole in PVR cases

and deprives the revoking authority of any discretion not to revoke parole.[2]

The District Court found that the revocation procedures formerly employed by Petitioners failed to meet the requirements of *Morrissey*, 408 U.S. 471, and its progeny. However, the court granted summary judgment for Petitioners on the grounds that enactment of the new rule rendered moot the claims presented in the amended complaint. The court denied Respondents' motion for summary judgment. On June 15, 1993, Respondents moved to alter or amend the judgment, arguing, *inter alia*, that application of the new rule to persons whose initial offenses occurred prior to the effective date of the new rule violates the *ex post facto* bar. On October 22, 1993, the court denied the motion to alter or amend.

Respondents appealed on November 17, 1993. Notably, Petitioners did not cross-appeal the adverse determination on the merits of the due process claim. On January 9, 1995, the Sixth Circuit Court of Appeals issued its decision affirming the District Court's determination that Respondents' due process challenge was rendered moot by enactment of the new rule.[3] However, the Sixth Circuit Court of Appeals granted partial relief on the basis of Respondents' *ex post facto* claim.[4] The court identified a subclass against which the new rule could not be applied, *i.e.*, those mem-

---

[2] *See* § 5120:1-1-21 of the Ohio Administrative Code ("O.A.C. § 5120:1-1-21"), reproduced in the Appendix at A-30. The Sixth Circuit Court of Appeals determined that the effective date of the rule is September 1, 1992. Further, effective October 6, 1994, Petitioners also amended § 2967.15 of the Ohio Revised Code ("O.R.C. § 2967.15"), the statute governing parole revocations in Ohio. O.R.C. § 2967.15(B) now denies the right to a parole revocation hearing to any "parolee, furloughee, or other releasee who is convicted of or pleads guilty to any offense committed while on parole, furlough, or other release". O.R.C. § 2967.15(B) is reproduced in the Appendix at A-31.

[3] Respondents have filed a petition for writ of certiorari in Case No. 94-9509 challenging the resolution of the due process issue.

[4] The court did not specifically address the effect of the recent amendment to O.R.C. § 2967.15 (B). *See* section I, A, 2, *infra*, as to the prejudicial impact of this amendment on parolees in Ohio.

bers of the class whose initial offenses were committed prior to the effective date of the new rule and whose parole is subject to revocation under the new rule.

On February 28, 1995, the Sixth Circuit Court of Appeals issued an order revising its January 9, 1995 opinion by striking certain language.[5] This order also denied the parties' petitions for rehearing.[6] The mandate issued on March 8, 1995. The District Court entered its order executing the mandate on March 22, 1995. Respondents moved to alter to amend this order on April 3, 1995 and said motion is pending before the court. On May 3, 1995, Petitioners filed a motion for relief from judgment to determine the effect of this Court's decision in *California Department of Corrections v. Morales*, ___ U.S. ___, 115 S.Ct. 1597 (1995), upon the Sixth Circuit's mandate herein. This motion is also pending before the District Court.

B. CLARIFICATION OF MISLEADING PORTIONS OF PETITIONERS' STATEMENT OF THE CASE.

Petitioners' Statement of the Case is misleading in the following respects. First, Petitioners state that the Sixth Circuit Court of Appeals sustained the mootness finding

[5] Thus, the opinion appearing at A-1 of Petitioners' petition does not reflect the final version of the court's opinion. See the published opinion reproduced herein at A-1.

[6] Respondents' petition for rehearing beseeched the court to address specifically their challenge to the due process rationale utilized by the District Court and the Court of Appeals. Respondents also requested a ruling on a *res judicata* issue which was briefed but neither addressed nor resolved by the court's January 9, 1995 opinion. The due process issue is the subject of Respondents' petition for writ of certiorari in Case No. 94-9509.

as to the entire class. Petition, 4. This is not so. The conclusion that the new rule may not be applied against the identified subclass means that the new law is a nullity as to that subclass. The original claims of the identified subclass cannot be rendered moot by a nullity. Their claims present a live controversy; otherwise, the Sixth Circuit's mandate granting the subclass declaratory and prospective injunctive relief would be meaningless.

Second, Petitioners devote three paragraphs of their petition to the fact that the conclusion of the January 9, 1995 opinion contained a phrase ("and also a parole violation offense conviction") which was entirely inconsistent with the rationale and language of the court's *ex post facto* discussion in the body of the opinion, *i.e.*, part III, C of the opinion. Petition, 4-5. Petitioners thereby suggest that the court, itself, was confused as to its holding and its reasons therefor. This characterization is wholly inaccurate and misleading. The phrase in question appears nowhere in the text of part III, C of the opinion. *Kellogg v. Shoemaker*, 46 F.3d 503, 509-10 (6th Cir. 1995). Nothing in the court's *ex post facto* discussion suggests that the date of the violation conviction is relevant to the *ex post facto* analysis in any way. In fact, the only mention of the subsequent violation offense in the court's opinion is in the context of clarifying that the date of the initial crime, rather than the violation, is the critical date for *ex post facto* purposes. *Kellogg*, 46 F.3d at, 510, n. 6. The inclusion of the phrase in the conclusion of the opinion was clearly anomalous and mistaken. The court recognized this fact in its February 28, 1995 Order when it corrected the mistake while, at the same time, it rejected Petitioners' plea to revisit this issue on rehearing.

As to the February 28, 1995 Order denying the petitions for rehearing, Petitioners criticize the court because it "declined to elaborate further on its *ex post facto* analysis." Petition, 5. This criticism is unfair because it erroneously implies that there was a need to elaborate on the *ex post facto* analysis in the January 9, 1995 opinion. Part III, C of the opinion, however, is unambiguous and requires no further elaboration. Moreover, it is unfair for Petitioners to criticize the court's refusal to countenance Petitioners' attempt to exploit the incongruity in the conclusion of the opinion so as to allow Petitioners to revisit on rehearing an issue which had already been fully briefed, argued, and resolved. Petitioners' petition for rehearing consisted solely of arguments which had already been made in their merit brief. Accordingly, there was no reason for the court to elaborate on its *ex post facto* analysis.

Third, the petition omits any reference to Petitioners' amendment of O.R.C. § 2967.15, effective October 4, 1994. As amended, O.R.C. § 2967.15(B) deprives any parolee of the right to a revocation hearing where the parolee has been "convicted of or pleads guilty to **any offense** committed while on parole" (emphasis added). This new statute is much broader than O.A.C. § 5120:1-1-21, which mandates summary revocation only for parolees who are convicted of an offense which requires sentencing the parolee to Petitioners' custody, *i.e.,* a felony conviction.

The new statute requires Petitioners to summarily revoke parole even for minor misdemeanor offenses committed while on parole. A conviction, for example, for violating a municipal ordinance prohibiting spitting on a sidewalk must result in returning the parolee to prison and revoking his or her parole without a hearing. Throughout the history of the Ohio parole system, traffic and misdemeanor offenses have been treated,

at most, as technical parole violations.[7] Persons charged with technical parole violations have always been entitled to the rights enumerated in *Morrissey*, 408 U.S. 471, and its progeny. Only persons convicted of felonies committed while on parole were subject to the PVR revocation process. *See* former O.A.C. § 5120:1-1-19(A). Thus, O.R.C. § 2967.15(B) fundamentally alters the parole revocation system in Ohio.[8] The critical point for the purposes of the instant petition is that, under the *ex post facto* analysis proposed by Petitioners, all parolees convicted of minor misdemeanor offenses while on parole **must** be returned to prison and **must** have their paroles revoked without a hearing regardless of whether their initial offense was committed prior to the effective date of the new statute.

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[7] Prior to the amendment, a parolee's supervising officer normally would not treat traffic and minor misdemeanor offenses as violations warranting revocation. Rather, the officer would impose lesser sanctions involving closer supervision of the parolee.

[8] Respondents advised the Sixth Circuit Court of Appeals of the amendment of O.R.C. § 2967.15 in their "Additional Citation." The court did not mention the new statute in its opinion. While the Sixth Circuit Court of Appeals did not address the effect of the new statute on the instant litigation, there is no doubt but that application of the rationale in the court's January 9, 1995 decision to the new statute would result in a finding that retrospective application of the new statute would violate the *Ex Post Facto* Clause.

REASONS FOR DENYING THE WRIT

I. THE GROUNDS SET FORTH IN THE PETITION ARE INSUFFICIENT TO WARRANT GRANTING A WRIT OF CERTIORARI. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISION IN *CALIFORNIA DEPARTMENT OF CORRECTIONS V. MORALES*, ___ U.S. ___, 115 S.Ct. 1597 (1995). THUS, GRANTING THE PETITION AND REMANDING FOR FURTHER CONSIDERATION IN LIGHT OF *MORALES* IS UNWARRANTED.

The questions presented for review in the petition fail to state sufficient grounds to warrant this Court's exercise of its jurisdiction.[9] At bottom, Petitioners' claims can be reduced to two assertions: (1) in their first question presented for review, Petitioners assert that the Sixth Circuit Court of Appeals failed to follow the *ex post facto* analysis set forth in *Collins v. Youngblood*, 497 U.S. 37 (1990); and *California Department of Corrections v. Morales*, __ U.S. __, 115 S.Ct. 1597 (1995); and (2) in their second question presented for review, Petitioners argue they should be permitted to revive a defense which the District Court rejected as specious, which Petitioners waived by failing to cross-appeal, and which the Sixth Circuit had no opportunity to review due to Petitioners' waiver. As demonstrated below, both of these assertions are groundless and fail to warrant this Court's granting the writ of certiorari.

Preliminarily, it is noteworthy that Petitioners waived several opportunities to ensure that the Sixth Circuit Court of Appeals would have the benefit of this Court's resolution of *Morales*, 115 S.Ct. 1597, when it decided this case. On October 12, 1994, Respondents filed their "Additional Citation" in which they advised the Sixth Circuit Court of

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[9] Petitioners do not assert that this case presents an issue on which there is a conflict among the circuits. Nor do they assert that there is a conflict between the decision below and that of any state court of last resort. Petitioners do not, and cannot, allege that the case involves a question which has not been resolved by this Court. Petitioners likewise do not attempt to demonstrate that the proceedings before the Sixth Circuit Court of Appeals were such that they warrant the exercise of this Court's supervisory jurisdiction.

Appeals and Petitioners that this Court had recently granted review in *Morales*, *id* Moreover, Respondents' counsel raised the matter at oral argument before the Sixth Circuit and the court entertained a brief colloquy on *Morales* during Respondents' argument. At no time did Petitioners move for a stay pending this Court's decision in *Morales*. Nor did Petitioners move the Court of Appeals to recall the mandate after this Court rendered the *Morales* decision. The fact that the court decided this case without *sua sponte* ordering a stay, coupled with Petitioners' failure to request a stay, indicates that the parties and the court unanimously concluded that the issues in *Morales* are easily distinguishable from those in the instant case. Certainly, Petitioners' inaction in the face of the proceedings in *Morales* speaks louder than the belated pleas in their petition before this Court.

Respondents demonstrate below that the decision of the Sixth Circuit is consistent with the analysis applied by this Court in *Morales*. Application of the new rule retrospectively to members of the identified subclass[10] will result in the effect prohibited by the *Ex Post Facto* Clause, *i.e.*, it will increase the time spent in prison on the initial

[10] The term "identified subclass" refers to the subclass of the plaintiff class against whom the Sixth Circuit Court of Appeals determined application of the new rule is barred by the *Ex Post Facto* Clause. The subclass consists of those class members whose initial crimes were committed before the effective date of the rule and who are subject to parole revocation under the rule. *See Kellogg v. Shoemaker*, 46 F.3d 503, 509-10 (1995).

crime[11] where the sentence for the new offense is stayed, suspended, modified, vacated, or has expired. Petitioners' contrived readings of the opinion below and of this Court's decision in *Morales* are unavailing. There is, then, no reason justifying a grant of certiorari and referral back.

A. THE STATUTE AT ISSUE IN *MORALES*, 115 S.CT. 1597, IS SUBSTANTIVELY DIFFERENT FROM THAT IN THE INSTANT CASE. ACCORDINGLY, *MORALES* IS INAPPOSITE AND DOES NOT WARRANT GRANTING REVIEW OR REMAND.

The most critical distinction between *Morales*, 115 S.Ct. 1597, and the instant case consists in the differences between the statutes scrutinized therein. *Morales* involved an amendment to a statute governing the frequency with which a very limited class of inmates is permitted to appear before the parole board, after the initial parole suitability hearing, for a determination whether the inmate is suitable for release prole.[12] The Court repeatedly emphasized that the statute did **not** modify "the standards for fixing a prisoner's initial date of 'eligibility' for parole", and that it did not modify the standards for determining an inmate's "'suitability' for parole and setting his release date". *Morales, id.* at 1602. *See also id.* at 1602 (the statute "simply 'alters the method to be followed' in fixing a parole release date under identical substantive standards."); and *id.* at 1604 ("The amendment has no effect on the date of any prisoner's initial parole suitability hearing; it affects the timing only of subsequent hearings.").

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[11] The term "initial crime" is a term of art which the Sixth Circuit Court of Appeals used to refer to "the crime from which the inmate has been paroled. It does not refer to the subsequent violation while on parole." *Kellogg*, 46 F.3d at 510, n. 6.

[12] In an effort to convince this Court to grant review, Petitioners distort the analysis and result in *Morales*. For example, Petitioners describe *Morales* as reviewing a statute which modified parole eligibility standards. *See* section I, A, 1, *infra*.

The crucial consideration in this Court's analysis was whether the "amendment will have any effect on any prisoner's actual term of confinement." *Morales, id.* at 1604; *also, see id.* at 1605 ("Such a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings."); and *id.* at 1602, n. 3 ("After *Collins* [*v. Youngblood,* 497 U.S. 37, (1990),] the focus of the *ex post facto* inquiry is *** on whether any such change *** increases the penalty by which a crime is punishable."). Since the amendment merely altered the method to be followed in establishing a release date, but did not modify the substantive standards for establishing that release date, the Court concluded that retrospective application of the amendment was not barred by the *Ex Post Facto* Clause. *Id.* at 1602.

O.A.C. § 5120:1-1-21 differs from the amendment at issue in *Morales* in the following important respects. First, O.A.C. § 5120:1-1-21 regulates parole revocation proceedings rather than parole release suitability proceedings. The decision to revoke parole directly implicates the concerns behind the *Ex Post Facto* Clause because it amounts to imposition of additional punishment for the initial crime. Second, O.A.C. § 5120:1-1-21 will have the direct and immediate effect of increasing the actual terms of confinement for some members of the identified subclass. Finally, enactment of O.A.C. § 5120:1-1-21 modified the substantive standards for determining whether parole should be revoked. These distinguishing features not only demonstrate why the Sixth Circuit Court of Appeals found an *ex post facto* violation in this case, but also that this conclusion is consistent with *Morales*.

1. **UNLIKE THE AMENDMENT AT ISSUE IN MORALES, 115 S.CT. 1597, O.A.C. § 5120:1-1-21 INVOLVES THE DECISION TO REVOKE PAROLE AND IMPOSE ADDITIONAL CONFINEMENT FOR THE INITIAL OFFENSE. THIS DETERMINATION DIRECTLY IMPLICATES THE CONCERNS EMBODIED IN THE *EX POST FACTO* CLAUSE AS CONSTRUED IN *MORALES*.**

As a point of departure, it is vital to recognize that the decision to revoke parole constitutes the imposition of additional punishment for the initial crime. This is patently clear in the technical parole violation context. It is equally true in the PVR context, notwithstanding that a new sentence has been imposed. The new sentence punishes the new criminal conduct and is not coextensive with the parole revocation. As the District Court held, "Moreover, *Moody v. Daggett,* 429 U.S. 78 (1976), made clear that a parolee's incarceration on an entirely new charge is not coextensive with the revocation of his parole."[13] May 27, 1993 Opinion and Order, 7. The confinement for the parole violation is independent of the new sentence. If the new sentence is terminated in some way, as demonstrated in section I, A, 2, *infra*, the revocation decision will prevent the parolee's release.

The decision to revoke parole entails two components. The first component is the revoking authority's decision to re-confine the parolee to an additional term of imprisonment on the initial crime because of the parole violation. The second component is the revoking authority's determination of how much additional confinement for the initial crime is warranted by the parole violation. In other words, the parole revocation decision amounts precisely to the imposition of additional punishment for the initial crime, the key factor in the *ex post facto* analysis in *Morales*, 115 S.Ct. 1597. This feature was lacking in the amendment at issue in *Morales*. Presumptively, a law which

[13] Petitioners did not appeal this adverse determination and have waived any challenge thereto.

mandates the imposition of an additional prison term in parole revocation proceedings is far more likely to implicate the concerns behind the *Ex Post Facto* Clause than a statute which merely modifies the frequency with which an inmate is considered for parole release suitability.

In this regard, the Petition consistently mischaracterizes the amendment reviewed in *Morales*. Petitioners repeatedly assert that the statute in *Morales* modified parole eligibility standards and that *Morales* clarified the *ex post facto* implications of such changes. Petitioners then erroneously equate parole eligibility proceedings with parole revocation proceedings for *ex post facto* purposes. Referring to *Morales*, *id.* at 1602, n. 3, Petitioners state:

> Accordingly, the Court discredited totally the premise that a change in **parole eligibility** rules, by virtue of a possible effect upon the prisoner's opportunity for early release, should be equated ipso facto with a retrospective increase in punishment prohibited by the ex post facto clause. (Emphasis added.)

Petition, 9.[14]

As indicated above, the amendment reviewed in *Morales* had nothing to do with the standards for establishing parole eligibility. While the amendment changed the procedures for determining an inmate's suitability for release, it left untouched the standards for becoming eligible for parole. The statute did not retroactively terminate a prisoner's parole eligibility, it only reduced the frequency of suitability hearings. This

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[14] *See also* Petition, 11 ("As the Court made clear in *Morales*, a change in **parole eligibility** rules cannot be considered ipso facto to effect an increase in punishment for the purposes of the ex post facto clause." (emphasis added)); and Petition, 13 ("Unlike **parole eligibility** rules, a change in parole revocation procedures cannot in any way increase the amount of time an inmate must serve before obtaining release on parole." (emphasis added)).

Court carefully pointed out at several points in its decision that the case does not involve a change in parole eligibility. *Morales, id.* at 1602 ("The amendment had no effect on the standards for fixing a prisoner's initial date of eligibility for parole, *** or for determining his 'suitability' for parole and setting his release date *** ."); and *id.* at 1604.

Petitioners overlook the significant, substantive difference between parole eligibility and suitability for release on parole. Serious *ex post facto* implications attach to changes in parole eligibility matters. *Warden v. Marrero,* 417 U.S. 653, 663 (1974). These implications were not addressed in *Morales,* notwithstanding Petitioners' assertions otherwise. Even more serious *ex post facto* implications attach to modifications in parole revocation proceedings, because revocation of parole constitutes imposition of additional punishment for the initial crime. *Morales* clearly does not address these more serious issues.

2. O.A.C. § 5120:1-1-21 WILL HAVE THE DIRECT AND IMMEDIATE EFFECT OF INCREASING THE ACTUAL TERMS OF CONFINEMENT FOR SOME MEMBERS OF THE IDENTIFIED SUBCLASS, UNLIKE THE AMENDMENT AT ISSUE IN *MORALES*, 115 S.CT. 1597.

As indicated *supra,* the crucial fact for *ex post facto* purposes under *Morales,* 115 S.Ct. 1597, and *Collins,* 497 U.S. 37, is whether the new law will have any effect on any prisoner's actual term of confinement. *Morales, id.* at 1602, n. 3, 1604, and 1605. O.A.C. § 5120:1-1-21, when applied retrospectively, unquestionably will have the direct and immediate effect of increasing the actual terms of confinement for some members of the identified subclass.

Former O.A.C. § 5120:1-1-19, the law in effect when the members of the identified subclass committed their initial offenses, provided that:

> (A)(1) In the event a releasee is convicted and sentenced on a new felony under Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 has been violated. In such cases, as applicable, the parole revocation hearing will be confined to the determination of mitigating circumstances.
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> ***
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> (D) If at the hearing it is found by substantial evidence considering the record as a whole, that the alleged violation has been proved and that mitigating circumstances, if any, do not make revocation inappropriate, release shall be revoked by the Parole Board.
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> (E) If the hearing panel, in its discretion, determines that revocation of release is inappropriate even if the alleged violation has been proved, the inmate shall be released to his former status, provided, however, that in the discretion of the Parole Board the terms and conditions of release may be modified *** .

Under this rule, members of the identified subclass could avoid revocation by establishing sufficient mitigating circumstances to satisfy the panel that revocation would be inappropriate. The subclass members also were entitled to enjoy the panel's exercise of its discretion not to revoke parole.

O.A.C. § 5120:1-1-21 terminates these rights. It deprives the revoking authority of any discretion to find that mitigating factors render revocation inappropriate and to order the parolee restored to parole. It also deprives the parolee of the right to a meaningful hearing on mitigation. By terminating these rights, O.A.C. § 5120:1-1-21 will increase the term of confinement some subclass members will serve on their initial crimes. The subclass members who will be prejudiced are those who are able to secure release from the new sentence and who would otherwise be restored to parole, but for the parole revocation under O.A.C. § 5120:1-1-21.

There are many situations under Ohio law in which a PVR may secure release from the sentence for the new offense, *e.g.*, by being granted probation, shock probation, or an appeal bond, or by securing correction, modification, or vacation of the sentence by way of direct or collateral review. In addition, the new sentence could simply expire.[15] *See, e.g., State ex rel. Jackson v. Denton,* 5 Ohio St.3d 179 (1983) (where Petitioners revoked a PVR's parole without a mitigation hearing even though the trial court granted probation on the new offense knowing the defendant was on parole at the time of the offense). It is precisely in situations where the new sentence is suspended, modified, or vacated that mitigating circumstances are most likely to exist.

Under former O.A.C. § 5120:1-1-19, a PVR who presented sufficient mitigation could be released from prison and restored to parole. O.A.C. § 5120:1-1-21 has extinguished that possibility. By doing so, the new rule will cause such PVRs to be confined on the initial sentence for a longer time than they would have been under the former rule. This is exactly the "effect" the Court in *Morales* recognized as prohibited by the *Ex Post Facto* Clause. *Morales,* 115 S.Ct. at 1603; *Collins*, 497 U.S. at 43; *accord Beazell v. Ohio*, 269 U.S. 167, 171 (1925) ("the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation"). The amendment in *Morales* survived scrutiny under the *Ex Post Facto* Clause because it did not result in such additional confinement for the initial crime.

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[15] This scenario will occur more frequently as a result of the amendment to O.R.C. § 2967.15. Vast numbers of parolees will be returned to prison for minor misdemeanor offenses which may not even result in a term of confinement at all. Similarly, many PVRs will be returned to a state penal institution for misdemeanor convictions in which they were sentenced to time served in the local jail or where their local jail sentences have already expired by the time they are conveyed to prison for the parole revocation.

3. ENACTMENT OF O.A.C. § 5120:1-1-21 MODIFIED THE SUBSTANTIVE STANDARDS FOR DETERMINING WHETHER PAROLE SHOULD BE REVOKED IN PVR CASES.

The amendment construed in *Morales*, 115 S.Ct. 1597, is also distinguishable on the basis that, as the Court repeatedly stated, the amendment did not alter the standards for determining parole eligibility or parole suitability. Likewise, it did not modify the substantive standards for fixing a parole release date. O.A.C. § 5120:1-1-21, however, effectuated a substantive change in the standards for determining whether parole should be revoked in PVR cases. In other words, the new rule changed the substantive standards for determining whether additional confinement for the initial crime is warranted by the parole violation.

Under the rule in effect when the members of the identified subclass committed their initial crimes, the standard for determining whether to revoke parole in PVR cases was a discretionary one and permitted restoration to parole notwithstanding the parole violation. Former O.A.C. § 5120:1-1-19(A), (D), and (E). Specifically, the standard formerly applied was that parole would be revoked except where the panel, in its discretion and after a meaningful mitigation hearing, determined that mitigating circumstances rendered revocation inappropriate. *Kellogg*, 46 F.3d at 509.

Enactment of O.A.C. § 5120:1-1-21 fundamentally changed the prior standard by mandating that Petitioners revoke parole in every PVR case, regardless of any mitigating factors in a particular case. The new rule provides, in pertinent part:

> (A) The adult parole authority shall revoke the release of any releasee who is recommitted to the department of rehabilitation and correction to serve a sentence imposed upon him by any court in Ohio for an offense he committed while on any release granted by the adult parole authority ***.

> (B) This revocation shall be accomplished by the issuance of minutes by the adult parole authority after it has verified that the sentence was imposed for an offense that occurred while the prisoner was under release status.

Enactment of this rule constituted imposition of a mandatory revocation standard where a discretionary one previously existed.[16] Petitioners have no legal alternative but to revoke parole in PVR cases. The rule eliminates the right to a mitigation hearing and to the panel's exercise of discretion to restore a PVR to parole in light of the mitigating circumstances. Further, the court below recognized that Petitioners enacted the new rule for the precise purpose of imposing a new standard for revoking parole in PVR cases:

> Thus, the agency can "declare" a parolee to have been convicted of a subsequent violation while on a parole to be a "violator" either by administrative rule, or through an individual hearing. The agency has chosen to address these cases by administrative rule *** .

Kellogg, 46 F.3d at 507-08.

Petitioners assert that, "the substantive standards for determining whether parole should be revoked were not altered by the rule change." Petition, 13. This assertion defies reason. O.A.C. § 5120:1-1-21 clearly reflects the codification of Petitioners' judgment that parolees who commit felonies while on parole must always have their parole summarily revoked regardless of any mitigating factors which may exist in an individual case and regardless of whether, for example, the new sentence is overturned on

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[16] This is similar to the change which the Court found violated the *Ex Post Facto* Clause in *Lindsey v. Washington*, 301 U.S. 397 (1937). There, the statute modified the sentencing standard from one which **allowed** imposition of a fifteen (15) year sentence to one which **required** a fifteen (15) year sentence. *See Dobbert v. Florida*, 432 U.S. 282, 300 (1977) ("[U]nder the new law it was the only sentence he could

appeal or suspended by the trial court.[17] This new standard is clearly at odds with the provisions of former O.A.C. § 5120:1-1-19.

Additionally, Petitioners argue that the revocation standards have not changed because, "even under the old rule, inmates who were convicted of crimes committed while on parole were conclusively presumed to be parole violators." Petition, 13. Petitioners are mixing apples with oranges. Under both the new and former rules, there is a conclusive presumption of a parole violation. *See Gagnon v. Scarpelli,* 411 U.S. 778 (1973). This standard has not changed. What has changed is the standard applied to the next step of the revocation decision, *i.e.,* whether the violation warrants revocation or some lesser sanction.

Petitioners also assert that "Respondents argued from the outset that the PVR revocation process under the old rule resulted in the revocation of parole in every case in which the PVR was found to have been convicted of a felony while on parole." Petition, 13, n. 4. That is, Petitioners attempt to prove that enactment of O.A.C. § 5120:1-1-21 worked no change in the revocation standards because the results of the "hearings" under the former rule and those obtained under the new rule are identical.[18] This argument fails to prove that the legal standards have not changed; it only establishes

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have received, while under the old law the sentencing judge could in his discretion have imposed a much shorter sentence.").

[17] Petitioners admitted under questioning at oral argument below that, even where a PVR's new conviction is reversed on appeal, Petitioners will not restore the PVR to parole, but will retain the PVR in custody until the PVR can obtain release through further litigation, *e.g.,* by filing a state habeas corpus action.

[18] Respondents established in their motion for summary judgment that Petitioners have never failed to revoke a PVR's parole. However, Respondents' proof also demonstrates that Petitioners have never conducted a PVR revocation hearing that comports either with the requirements of due process or with former O.A.C. § 5120:1-1-19. Even though Petitioners represented to the court in *Moss v. Patterson,* 555 F.2d 137, 138 (6th Cir.), *cert. denied sub nom., Kette v. Moss,* 434 U.S. 873 (1977), that they were providing hearings to PVRs under former O.A.C. § 5120:1-1-19, and even though the court in *Moss, id.,* specifically

that, by enacting the new rule, Petitioners legitimated a practice which was illegal under the former rule.[19] Petitioners' illegal conduct in failing to satisfy the former standard cannot prove that the former standard did not exist. It is, indeed, spurious for Petitioners to argue that their illegal conduct defines the legal standard in effect under the former rule.

It is obvious, then, that O.A.C. § 5120:1-1-21 establishes a new standard for determining whether parole should be revoked in PVR cases. Likewise, this new standard is more onerous than the standard under former O.A.C. § 5120:1-1-19. As a result of the new standard, many subclass members will spend more time in prison for their initial crimes than they would have under the former rule. These factors clearly distinguish O.A.C. § 5120:1-1-21 from the amendment addressed in *Morales*, 115 S.Ct. 1597, and just as clearly establish a violation of the *Ex Post Facto* Clause.

B. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT RETROSPECTIVE APPLICATION OF O.A.C. § 5120:1-1-21 VIOLATES THE *EX POST FACTO* CLAUSE BECAUSE SUCH APPLICATION WILL RESULT IN INCREASING THE AMOUNT OF TIME MEMBERS OF THE IDENTIFIED SUBCLASS WILL SPEND IN PRISON ON THE INITIAL CRIME.

1. THE ANALYSIS BELOW.

The Sixth Circuit properly found that retrospective application of O.A.C. § 5120:1-1-21 violates the *Ex Post Facto* Clause because such application will result in increasing the amount of time members of the identified subclass will spend in prison. The

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held that PVRs are entitled to due process in the revocation of their paroles, not a single constitutionally adequate PVR revocation hearing has ever been conducted in Ohio.

[19] The District Court found that the procedures Petitioners actually applied under the former law failed to satisfy the requirements of due process. May 27, 1993 Opinion and Order, 5-7. Petitioners did not cross-appeal.

court's analysis is straightforward and falls well within the contours of this Court's *ex post facto* jurisprudence. *See Kellogg*, 46 F.3d at 509-10.

First, the court notes the traditional test for establishing an *ex post facto* violation: the law must (1) "be retroactive in application, and (2) 'must disadvantage the offender affected by it.'" *Kellogg, id.* at 509, quoting *Miller v. Florida*, 482 U.S. 423, 430 (1987); *accord Dobbert v. Florida*, 432 U.S. 282, 294 (1977) ("It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law."). The court also notes the axiom that the focus of the analysis "is the time the offense was committed." *Kellogg, id.; Weaver v. Graham*, 450 U.S. 24, 30-31 (1981).

The court then addresses the "disadvantage" or "more onerous" prong of the analysis. The court focuses on the substantive/procedural distinction because Petitioners argued that the rule was a mere procedural change. Applying *Dobbert*, 432 U.S. at 293, and *Miller*, 482 U.S. at 433, and upon finding that the new rule "affects substantive rights," the court concludes that "the new regulations may violate the *Ex Post Facto* Clause for a portion of the plaintiff class." *Kellogg, id. Accord Collins*, 497 U.S. at 45 ("While these cases do not explicitly define what they mean by the word 'procedural,' it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes."). Finally, the court determines that the new rule is retrospective as to the subclass of PVRs "who committed their initial crime before the new regulations came into effect but whose parole revocation proceedings will be governed by the new regulations." *Kellogg, id.* at 510.

The only aspect of the Sixth Circuit Court of Appeals' analysis which is arguably implicated by *Morales*, 115 S.Ct. 1597, is the discussion of the "disadvantage" prong of the *ex post facto* test. The retrospectivity prong of the *ex post facto* test was not litigated in *Morales*. In this regard, Petitioners again mischaracterize *Morales* by alleging that *Morales* held it to be error to look to the time of the initial crime in determining whether the law is retrospective for *ex post facto* purposes. Petitioners assail *Rodriguez v. United States Parole Commission*, 594 F.2d 170 (7th Cir. 1979). Petition, 10-11. Petitioners argue that *Morales* made it clear that "the Sixth Circuit's reliance on *Rodriguez* in focusing on the time of the inmate's initial offense was erroneous." *Id.* at 11.

This Court's opinion in *Morales* is void of any reference to the issue of whether the date of the initial crime or the date of the violation offense is the operative date for *ex post facto* purposes. This question was simply not presented. Petitioners do not cite any language in *Morales* to support their proposition because no such language exists. Accordingly, *Morales* does not warrant a remand on this issue.

Furthermore, the Sixth Circuit's resolution of this issue comports with this Court's *ex post facto* precedent. The court below specifically cited this Court's decision in *Weaver*, 450 U.S. 24, in support of its conclusion on this issue. In *Weaver*, this Court rejected the argument Petitioners made below and which they now repeat in their Petition. There, the Court looked to the date of the commission of the offense as the key date. *Weaver, id.* at 31 ("The critical question is whether the law changes the legal consequences of acts completed before its effective date."); *accord Miller*, 482 U.S. at 430.

Petitioners overlook the Sixth Circuit's reliance on *Weaver, id.*, in support of this proposition and focus only on *Rodriguez*, 594 F.2d 170. They fail to advise this Court that, in order to adopt their position, this Court must overrule *Weaver, id.*, not to mention the many circuit court decisions on this point. Petitioners' attack upon this well settled principle of *ex post facto* jurisprudence is utterly groundless and fails to warrant review or a remand.

2. THE ANALYSIS BELOW IS CONSISTENT WITH *MORALES*, 115 S.CT. 1597, *COLLINS*, 497 U.S. 37, AND *DOBBERT*, 432 U.S. 282 (1977).

a. THE SIXTH CIRCUIT'S DECISION ADOPTED THE SUBSTANTIVE/PROCEDURAL ANALYSIS IN *MILLER V. FLORIDA*, 482 U.S. AT 433, AND *DOBBERT V. FLORIDA*, 432 U.S. AT 293-94, NOT THE "SUBSTANTIAL DISADVANTAGE" APPROACH TAKEN IN *LINDSEY V. WASHINGTON*, AT 401. THIS COURT'S REAFFIRMATION OF *MILLER'S* SUBSTANTIVE/PROCEDURAL ANALYSIS IN *MORALES*, 115 S.CT. AT 1602, VINDICATES THE SIXTH CIRCUIT'S RESOLUTION OF THE ISSUE. PETITIONERS GROSSLY MISCHARACTERIZE THE *EX POST FACTO* RATIONALE APPLIED BY THE SIXTH CIRCUIT COURT OF APPEALS.

The Petition is laden with gross mischaracterizations of the *ex post facto* rationale applied by the Sixth Circuit Court of Appeals. In fact, the core of Petitioners' argument is based upon a fundamental mischaracterization of the Sixth Circuit's opinion. Petitioners erroneously allege that the court below applied the "substantial disadvantage" rationale which this Court decried in *Morales*, 115 S.Ct. at 1602, n. 3. Petitioners state:

> [T]he Sixth Circuit's resolution of the inmates' *ex post facto* claim hinged upon two basic conclusions: *** second, elimination of the mitigation hearing could not be done "retrospectively" because it would amount to a "substantial disadvantage" prohibited by the *ex post facto* clause.

Petition, 10.[20] This characterization is entirely inaccurate and is intended for the self-serving purpose of bringing the case within the purview of this Court's comments in *Morales, id.* at 1602, n. 3.

The Sixth Circuit did not utilize the "substantial disadvantage" rationale, but analyzed the case with a view to whether the rule worked a procedural or a substantive change. Neither Respondents' claims nor the Sixth Circuit's decision depend upon the "substantial disadvantage" analysis which originated in *Lindsey v. Washington*, 301 U.S. 397, 401 (1937), and which was disapproved of in Morales, 115 S.Ct. 1597.[21] Although the court used the term "disadvantage," it was not with the meaning this Court denounced in *Morales, id.* at 1602, n. 3, *i.e.*, in the sense of the "substantial disadvantage" language of *Lindsey*, 301 U.S. at 401. The court below simply used "disadvantage" as a shorthand reference to the requirement that the new law be "more onerous" than the old law. Surely the Court did not intend in *Morales*, *id.* at 1602, n. 3, to disapprove of this prong of the traditional analysis. To the contrary, the Court cites

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[20] *Also see* Petition, 6 (characterizing the Sixth Circuit's decision as finding an *ex post facto* violation "solely on the ground of an alleged 'substantial disadvantage' to the inmates"); Petition, 11 ("Of course, it was the elimination of this hearing which the Sixth Circuit found to be a 'substantial disadvantage' precluded by the *ex post facto* clause."); and Petition, 12 ("The Sixth Circuit focused exclusively on the alleged 'substantial disadvantage' to the inmates ***.").

[21] The Court in *Morales* generally cites *Lindsey* with approval. *Morales, id.* at 1601-02. The only disapproving note is sounded in footnote 3, where the Court disapproves only of the "substantial disadvantage" language in *Lindsey, id.* at 401, which was repeated in *Weaver, 450 U.S.* at 29, and *Miller, id.* at 433. This language applied the *ex post facto* bar to laws which merely "disadvantage" offenders, but which do not "alter the definition of criminal conduct or increase[ ] the penalty by which a crime is punishable." *Morales, id.* at 1602, n. 3. The proper exegetical analysis of *Morales'* footnote 3 must begin with the cited portions of *Lindsey, Weaver,* and *Miller* laid out side-by-side. This method demonstrates that the common thread linking these citations is *Lindsey's* "disadvantage" language. It is the ambiguity of "disadvantage" which the Court specifically assails in footnote 3.

with approval language in *Dobbert*, 432 U.S. at 294, applying the "more onerous" requirement. *Morales*, *id.* at 1603.[22]

The issue upon which the decision below turned was whether, as Petitioners argued, the new rule was merely procedural and, therefore, not subject to the *ex post facto* bar. *Kellogg*, 46 F.3d at 509. The determinative factor in the Sixth Circuit's analysis was its reliance on *Miller*, 482 U.S. at 433. The decision in *Miller* incorporated both the "substantial disadvantage" language cited in *Morales*, *id.* at 1602, n.3, and the substantive/procedural analysis. *Miller*, *id.* The Sixth Circuit relied not on the "substantial disadvantage" language, but on the discussion of the substantive/procedural issue. Immediately after the "substantial disadvantage" discussion, the Court in *Miller* addressed the substantive/procedural distinction:

> Finally, even if a law operates to the defendant's detriment, the *ex post facto* prohibition does not restrict "legislative control of remedies and modes of procedure which do not affect matters of substance." *Dobbert, 432 U.S.*, at 293 ***. Hence, no *ex post facto* violation occurs if the change in the law is merely procedural and does "not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt v. Utah*, 110 U.S. 574, 590 *** (1884). See *Dobbert, supra*, at 293-294 *** ("The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime"). On the other hand, a change in the law that alters a substantial right can be *ex post facto* "even if the statute takes a seemingly procedural form." *Weaver*, 450 U.S., at 29, n. 12 ***.

Miller, *id.* at 433. This is the language cited by the Sixth Circuit. *Kellogg*, *id.* at 509.

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[22] The court's use of "disadvantage" in reference to the "more onerous" prong is also consistent with *Collins*, 497 U.S. at 41, ("[I]t has long been recognized that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them.").

More importantly, the Sixth Circuit's resolution of the substantive/procedural issue is consistent with *Collins*, 497 U.S. 37. This is critical because, unlike the situation in *Morales,* the Court in *Collins* directly addressed the substantive/procedural distinction. There, the court summarized its view of the relevant precedent as follows:

> We think the best way to make sense out of this discussion in the cases is to say that by simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause. *** Subtle ex post facto violations are no more permissible than overt ones. In *Beazell* [*v. Ohio*, 269 U.S. 167 (1925)], we said that the constitutional prohibition is addressed to laws, "whatever their form," which make innocent acts criminal, alter the nature of the offense, or increase the punishment. *Id.*, 269 U.S. , at 170.

Collins, id. at 47. Accordingly, under both *Collins* and *Morales,* the ultimate question is whether the new rule, whether procedural or not, increases the punishment for the initial crime for some members of the identified subclass. The Sixth Circuit's analysis was aimed at precisely that question.

Additionally, this Court's reasoning *Morales* specifically vindicates the Sixth Circuit's reliance on *Miller, id.* In *Morales,* the Court specifically cited the above-quoted portion of *Miller* with approval:

> Rather than changing the sentencing range applicable to covered crimes, the 1981 amendment simply "alters the method to be followed" in fixing a parole release date under identical substantive standards. See *Miller, supra,* 482 U.S. at 433 *** (contrasting adjustment to presumptive sentencing range with change in "the method to be followed in determining the appropriate sentence"); see also *Dobbert v. Florida,* 432 U.S. 282, 293-294 *** (1977) (contrasting change in the "quantum of punishment" with statute that merely "altered the methods employed in determining whether the death penalty was to be imposed").

Morales, id. at 1602. This language exposes the fallacy in Petitioners' argument that the Sixth Circuit's decision represents the "broader" approach rejected in *Morales, id.* at 1602, n. 3. Since this Court incorporated into its analysis in *Morales* the same language the court below relied upon to reach its decision, *Morales* provides no basis for granting review or requiring a remand.

b. NOTWITHSTANDING PETITIONERS' GROSS MISCHARACTERIZATIONS TO THE CONTRARY, THE SIXTH CIRCUIT'S DECISION TURNED UPON WHETHER O.A.C. § 5120:1-1-21 WILL INCREASE THE ACTUAL TIME MEMBERS OF THE IDENTIFIED SUBCLASS WILL BE CONFINED FOR THE INITIAL CRIME.

Petitioners grossly misrepresent the Sixth Circuit's decision by claiming that the court failed to consider whether the change in the law will have an impact on any prisoner's actual term of confinement. "In contrast, the Sixth Circuit in this case focused exclusively on a perceived change in conditions, without considering whether the change had an impact on the sentence." Petition, 9.[23]

The Sixth Circuit's decision turned on the fact that the new rule will result in increasing the time served in prison on the initial crime for many PVRs. The court found an *ex post facto* violation because the new rule deprives some PVRs of "substantive rights attendant to parole revocation." *Kellogg*, 46 F.3d at 509. As the court reasoned:

> Although the change here involves a procedural matter - the right to a hearing on revocation of parole - it still affects substantive rights attendant to parole revocation. Under the old regulations, parole would be revoked for the full amount of time *unless* the inmate could convince the parole authority that mitigating circumstances warranted mercy. Under the new procedures, there is no opportunity to present these mitigating circumstances. This procedural change affects *substantive* rights. (Emphasis in original.)

[23] *Also see* Petition, 12 ("The Sixth Circuit *** did not address the fundamental question of whether the change in parole revocation rules resulted in an increase in punishment for the inmates' initial offenses.").

Kellogg, id. While framed in substantive/procedural terms, the court's analysis nevertheless turned on whether the new rule increases the punishment for the initial crime. The court properly focused on the key fact, *i.e.*, that the new rule deprives the PVRs of the right to an opportunity to avoid an increased sentence for the initial crime.

The factor that makes these rights substantive ones is the same factor that satisfies the *ex post facto* analysis in *Collins*, 497 U.S. 37,[24] and *Morales*, 115 S.Ct. 1597, *i.e.*, that the new rule mandates additional incarceration on the initial crime, even where the new sentence is stayed, suspended, modified, vacated, or expires, and eliminates the possibility of continued release on parole despite the violation. Therefore, the decision below is consistent with both *Morales* and *Collins*.

It is the Petitioners, not the court below, who have consistently failed to incorporate into their analysis the practical effect of the new law on the sentences served by members of the identified subclass for their initial crimes. Not once in the course of this litigation have Petitioners rebutted Respondents' arguments regarding the confining effect of the revocation decision where the sentence for the new offense is stayed, suspended, modified, vacated, or has expired.[25] While Petitioners do make the conclusory statement that "a change in parole revocation procedures cannot in any way increase the amount of time an inmate must serve before obtaining release on parole", they present no authority or argument to justify that conclusion. Petition, 13. Yet, simply assert-

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[24] This Court did not address the substantive/procedural distinction in *Morales*. Rather, that issue was addressed five years ago in *Collins*. Accordingly, *Morales* provides no justification warranting a remand.

[25] Due to the radical breadth of O.R.C. § 2967.15(B), there will be increasingly larger numbers of PVRs who are returned to prison after having already completed their sentences in local jails or who will not have received a sentence of confinement at all, *i.e.*, where the conviction is for a minor misdemeanor offense.

ing the proposition does not make it true. Moreover, Petitioners' logic is inherently flawed. What is a parole revocation if not the execution of an additional portion of the initial sentence?[26] Petitioners have no response to Respondents' argument because their analysis simply cannot account for the reality that PVRs will spend more time in prison on the initial crime when the new sentence no longer requires detention.

c. The result below is consistent with *Morales*, 115 S.Ct. 1597, and Collins, 497 U.S. 37.

Regardless of the validity of its analysis, the result reached by the Sixth Circuit is consistent with *Morales*, 115 S.Ct. 1597, and *Collins*, 497 U.S. 37. The Court held that the *Ex Post Facto* Clause prohibits retrospective application of laws which increase the penalty by which a crime is punishable. *Morales, id.* at 1601, 1602, n. 3; *Collins, id.* at 43. By specifically citing *Weaver*, 450 U.S. 24, with approval, the Court in *Morales* recognized that it has invalidated *ex post facto* modifications of substantive post-sentencing mechanisms which alter the time a prisoner spends in confinement for the crime. *Morales, id.* at 1601.[27] Moreover, this Court has applied the *ex post facto* bar to statutes involving parole, *Marrero,* 417 U.S. 653, and specifically to parole revocation.

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[26] In Ohio, a parole violation is not an independent offense punishable by a sentence prescribed by the Revised Code.

[27] *Accord Morales, id.* at 1602 ("The amendment also left unchanged the substantive formula for securing any reductions to this sentencing range."); *Morales, id.* at 1604 ("The amendment has no effect on the date of any prisoner's initial parole suitability hearing;" and "there is no reason to conclude that the amendment will have any effect on any prisoner's actual term of confinement."); and *Morales, id.* at 1605 ("Such a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings.").

Greenfield v. Scafati, 277 F.Supp. 644 (Mass. 1967) (three-judge court), *summarily aff'd*, 390 U.S. 713 (1968) (affirming the finding of an *ex post facto* violation where a statute, which eliminated the opportunity to accumulate gain-time for the first six months after a parole revocation, was applied to an inmate whose initial crime occurred before the statute's enactment). In *Morales*, the Court did not avail itself of the opportunity to jettison either *Marrero, id.*, or *Scafati, id.*, even though these cases were relied upon in Justice Stevens' dissenting opinion. *Morales, id.* at 1607 (Stevens, J., dissenting).

Thus, even if the court's analysis is inconsistent with *Morales* or *Collins*, remand is unwarranted because the result is consistent with those decisions. The new rule possesses features which radically distinguish it from the amendment scrutinized in *Morales*. *See* section I, A, *supra*. These features immediately implicate the *ex post facto* concerns set forth in *Morales* and *Collins*. Accordingly, the outcome would have been the same even if the Sixth Circuit had had the benefit of this Court's decision in *Morales*.

Since both the rationale and the result of the decision below are consistent with *Morales*, there is no justification for granting review or remanding for consideration in light of *Morales*.

II. PETITIONERS MAY NOT BE PERMITTED TO USE A PETITION FOR WRIT OF CERTIORARI TO REVIVE A DEFENSE OR CLAIM THEY WAIVED BELOW.

Petitioners' argument in support of their second question presented for review is based entirely on a defense which was rejected by the District Court as specious and which Petitioners waived by their failure to cross-appeal. They now seek to revive this

defense before this Court notwithstanding that the issue was not briefed and the Sixth Circuit Court of Appeals had no opportunity to review it.

Petitioners argue that:

> *** the change in the rule does not, in and of itself, have any retrospective effect on the an [*sic*] inmate's initial sentence. Rather, it is the prisoner's subsequent conviction for an offense committed while on parole which occasions the parolee's return to prison.

Petition, 13. This is the same argument rejected as specious by the District Court in its May 27, 1993 Opinion and Order:

> Defendants contend, first, that the procedures followed under OAC §5120:1-1-19(A)(1) do not contravene any constitutional dictates because PVRs, who are already in custody on the new conviction, do not in fact qualify as parolees. Accordingly, defendants argue, no action taken by parole officials can result in the deprivation of the PVRs' liberty, This argument is specious.
>
> The United States Court of Appeals for the Sixth Circuit has specifically recognized that PVRs in Ohio are entitled to a final revocation hearing consistent with Morrissey [v. Brewer, 408 U.S. 471 (1972),] and Gagnon [v. Scarpelli, 411 U.S. 778 (1973)]. Inmates' Councilmatic Voice v. Rogers, *541 F.2d 633 (6th Cir. 1976)*. Moreover, Moody v. Daggett, 429 U.S. 78 (1976), made clear that a parolee's incarceration on an entirely new charge is not co-extensive with the revocation of his parole. Finally, it is indisputable that the actual result of the final parole revocation hearing is the panel's revocation of the PVR's parole.

May 27, 1993 Opinion and Order, 7. Petitioners' argument contradicts both *Moody*, 429 U.S. 78, and *Gagnon*, 411 U.S. at 790 (holding that not only are PVRs entitled to the procedural rights under *Morrissey*, 408 U.S. 471 but they are also entitled to the right to counsel where, "even if the violation is a matter of public record ***, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate,

and that the reasons are complex or otherwise difficult to develop or present."). *Also see Moss v. Patterson*, 555 F.2d 137 (6th Cir.), *cert. denied sub nom. Kette v. Moss*, 434 U.S. 873 (1977).

Petitioners elected not to cross-appeal the District Court's rejection of their sole defense to the merits of Respondents' claims. By doing so, they assumed the risk of an adverse judgment on appeal. Additionally, their failure to appeal deprived the Sixth Circuit of the opportunity to review this issue. Petitioners' waiver of this issue defeats their transparent attempt to revive the issue via the Petition for writ of certiorari.

Petitioners' failure to cross-appeal is particularly fatal to their instant attempt to secure a remand because Petitioners were explicitly aware that a decision was pending in *Morales*, 115 S.Ct. 1597, when they decided not to cross-appeal.[28] This is similar to the situation presented in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). There, the petitioners sought modification of a consent decree because of the Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). However, *Bell* was pending in this Court at the time the parties executed the consent agreement, just as *Morales* was pending when Petitioners decided not to cross-appeal. Given these facts, this Court stated:

> [P]etitioners were undoubtedly aware that *Bell* was pending when they signed the decree. Thus, the case must be judged on the basis that it was immaterial to petitioners that double celling might be ruled unconstitutional *** .

[28] Respondents brought the matter to their attention in Respondents' "Additional Citation" and during oral argument before the Sixth Circuit.

Rufo, id. at 388. Likewise, it must be adjudged that Petitioners' waiver of this issue in the face of an impending decision in *Morales* defeats their instant attempt to secure review or a remand on the basis of *Morales*.

As to the substance of their second question presented for review, Petitioners fail to inform the Court that adoption of Petitioners' argument will require the Court to overrule firmly established precedent, *i.e.*, *Gagnon*, 411 U.S. at 790; *Moody*, 429 U.S. 78; and *Black v. Romano*, 471 U.S. 606 (1985). Petitioners have failed to provide the Court with authority or argument of sufficient weight to warrant review or remand. Most certainly, this Court's decision in *Morales*, 115 S.Ct. 1597, provides no basis for such relief.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court to deny the petition for writ of certiorari because the case presents no issue appropriate for the Court's review, and because the judgment of the United States Court of Appeals for the Sixth Circuit was not in error.

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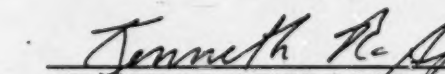

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CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b), Rules of the Supreme Court, I hereby certify that a true copy of the foregoing Respondents' Brief in Opposition was forwarded by regular U.S. Mail to Betty Montgomery, Ohio Attorney General, 30 East Broad Street, Columbus, Ohio 43266-0410, on this 30th day of June, 1995. I further certify that all parties required to be served have been served.

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#10070

EDITOR'S NOTE

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(3)

NO. 94-1964

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN W. SHOEMAKER, ET AL.,

Petitioners,

v.

GLENN S. KELLOGG; LANI R. SMITH; JOHN STAMPER; LAWRENCE DESSENBERG; ROBERT DONLEY; MICHAEL JONES; MICHAEL KARHOFF; DANIEL SCHREIBER,
on behalf of themselves
and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

APPENDIX

34pp

ing company allegedly negligently commingled with lower grade mineral was adequately established for purposes of applying market value rule for assessing damages, in view of publication that listed average price of high grade mineral.

5. Shipping ⇐131

Published market quotations of bulk commodities provide simple proof of market value and damages so as to support application of market value rule for assessing damages to cargo.

6. Shipping ⇐131

Sales price close in time to discharge date was sufficient to establish market value of downgraded mineral at time it was negligently commingled with high graded mineral for purposes of applying market value rule for assessing damages to shipper.

A. Carter Mills, IV, John C. Persons, Montgomery, Barnett, Brown, Read, Hammond & Mintz, New Orleans, LA, for appellant.

Richard B. Foster, Lemle & Kelleher, New Orleans, LA, for appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, DUHÉ and PARKER, Circuit Judges.

DUHÉ, Circuit Judge:

Defendant Turner Marine Bulk, a New Orleans stevedore, negligently commingled two lots of ferrochrome that Plaintiff Minerais U.S. Inc. was importing for resale in the United States. Minerais had purchased 700 metric tons (MT) high grade ferrochrome and 1000 MT low grade ferrochrome; 250 MT high grade ferrochrome escaped damage, and the remaining 450 MT high grade and the 1000 MT low grade ferrochrome were commingled. None of the combined material fell within the higher grade, and Plaintiff was forced to downgrade 450 MT high grade material to low grade for purposes of resale. This appeal concerns only the issue of damages.

The district court awarded damages based on wholesale values of the material (i.e., wholesale value of 450 MT high grade ferrochrome minus wholesale value of 450 MT low grade ferrochrome), finding that Plaintiff failed to establish the fair market value as the appropriate measure of damages. Holding that Plaintiff adequately established fair market values, we reverse and remand for application of the market-value rule using retail values as specified herein.

I. The Market-Value Rule.

[1, 2] The market-value rule requires that damages be calculated using market values *at the time the cargo is discharged*. Such a damage award places the injured cargo owner in the same position it was in before the damage. The market-value rule makes the cargo claimant whole by awarding him the difference between the fair market value of the undamaged cargo and the fair market value of the cargo as damaged on the date of discharge at the port of destination. *Cook Indus., Inc. v. Barge UM-308*, 622 F.2d 851, 854 (5th Cir.1980).

[3] Nothing in *Illinois Central Railroad v. Crail* compels use of the wholesale price rather than retail. *See Illinois Cent. R.R. v. Crail*, 281 U.S. 57, 64–65, 50 S.Ct. 180, 181, 74 L.Ed. 699 (1930) ("[The market-value rule] may be discarded and other more accurate means [to measure the loss] resorted to, if, for special reasons, it is not exact or otherwise not applicable.") (awarding wholesale value of lost shipment). *Illinois Central* was a shortage-in-delivery case, not a damaged-goods case; where cargo is downgraded but not completely destroyed, this Court has held the market-value rule to be both a convenient and accurate means of measuring damages. *Cook Indus.*, 622 F.2d at 855–56. We hold the rule provides an accurate measure of damages in this case as well.

A. Fair Market Value of Undamaged Cargo.

[4, 5] In June 1990, when the shipment was discharged in New Orleans, the average market price of high grade ferrochrome was $1.16 per pound of contained chromium, according to *Metals Week* (a weekly publication), which was found by the district court to be the most reliable evidence of the market price. Published market quotations of bulk commodities provide simple proof of market value and damages so as to support application of the market-value rule. *See* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 10–36 (2d ed. 1994); *see also Amstar Corp. v. M/V ALEXANDROS T.*, 472 F.Supp. 1289, 1294 (D.Md.1979), *aff'd*, 664 F.2d 904 (4th Cir.1981). Further, Minerais' retail sales price in August 1990 corroborated *Metals Week* by establishing $1.16 per pound of chromium as the retail price. The market value of high grade ferrochrome at the time of the arrival of the shipment was thus adequately established at $1.16 per pound of chromium.

B. Fair Market Value of Cargo as Damaged.

The 450 MT damaged cargo after commingling was indistinguishable from the 1000 MT low grade ferrochrome with which it was mixed. *Metals Week* did not list a price for low grade ferrochrome at the time of discharge of the shipment, because there was no established market for it at the time. Minerais ordered the low grade to test the market for it. Minerais sold the 1450 MT low grade product in varying quantities over several months and the price varied over those few months. The district court declined to rely on a retail price in part because of the declining market and in part because it was unclear which resale accounted for the 450 MT downgraded material.

[6] We hold that the sales price close in time to the discharge date is nevertheless sufficient to establish the market value of the downgraded product at the time of discharge. Some of the low grade material sold at $.99 per pound chromium in June and July 1990 as shown by two invoices (for sales of 160 MT and 400 MT). These contemporaneous sales provide sufficient evidence from which to apply the market-value rule. *See Standard Oil Co. v. Southern Pac. Co.*, 268 U.S. 146, 155, 45 S.Ct. 465, 466–67, 69 L.Ed. 890 (1925) (recognizing "contemporaneous sales of like property in the way of ordinary business" as one manner of establishing market value); *cf. Holden v. S.S. Kendall Fish*, 396 F.2d 910, 913 (5th Cir.1968) (requiring that damages be calculated at the time of delivery, because the carrier "is not and should not be the guarantor of the ups and downs of commodity prices").

We have no reason to factor in the varying prices of low grade ferrochrome over the ensuing months. Regardless of the fact that Plaintiff intended to introduce only a limited quantity of low grade ferrochrome into the United States market, the sale of 660 MT low grade product for $.99 per pound chromium near the time of delivery provides adequate proof of the fair market value of all of the downgraded product (only 450 MT) at the time of discharge.

II. Conclusion.

Applying the general measure of the shipper's recovery, i.e., the difference in market values before and after damage to the damaged cargo, will accurately compensate Plaintiff. Plaintiff having provided sufficient evidence of fair market values of both high and low grade ferrochrome at the time of delivery, we remand for calculation of damages under the market-value rule using the June 1990 retail values.

REVERSED and REMANDED.

A-1

Glenn S. KELLOGG; Lani R. Smith; Lawrence Dessenberg; John Stamper; Michael Jones; Robert Donley; Daniel Schreiber; and Michael Karhoff, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

John W. SHOEMAKER, et al., Defendants-Appellees.

No. 93-4287.

United States Court of Appeals, Sixth Circuit.

Argued Oct. 13, 1994.

Decided Jan. 9, 1995.

As Revised on Denial of Rehearing Feb. 28, 1995.

Prison inmates challenged constitutionality of new Ohio Parole Revocation proce-

dures. The United States District Court for the Southern District of Ohio, Sandra S. Beckwith, J., granted summary judgment for Parole Authority after Authority amended regulation and held that new policy rendered challenges moot. Appeal was taken. The Court of Appeals, Wellford, Circuit Judge, held that: (1) challenge to constitutionality of Ohio's new parole procedures was not moot where Parole Authority had substituted new procedure on eve of adjudication; (2) Parole Authority had power to address by means of administrative role cases in which parolee had been convicted of another felony while on parole; and (3) new state parole regulations which eliminated parolee's right to individual hearing where parole was convicted of felony while on parole could not be applied to parolees who committed initial crime before new regulations came into effect.

Affirmed in part; reversed and remanded in part.

1. Federal Courts ⇐13.15

Challenge to constitutionality of Ohio's new parole procedures was not moot where Parole Authority had substituted new procedure on eve of adjudication of challenge to old procedure. 42 U.S.C.A. § 1983; Ohio Admin.Code § 5120:1-1-12.

2. Federal Courts ⇐13.15

For purposes of determining whether action is moot, Parole Authority may not abort or delay constitutional review of parole procedures by substitution of new procedure on eve of adjudication.

3. Pardon and Parole ⇐65.1, 69

Ohio Parole Authority had power to administer all statutes relating to parole, including the power to determine whether convict had violated parole. Ohio R.C. §§ 2967.02, 2967.16.

4. Pardon and Parole ⇐86

Ohio statute requiring that parolee be given individual parole revocation hearing when parole officer has begun revocation hearing on his own initiation does not apply when basis for parole revocation is subsequent conviction. Ohio R.C. § 2967.16.

5. Pardon and Parole ⇐71, 86

State Parole Authority can declare that parolee who has been convicted of subsequent violation while on parole is in violation of parole either by means of administrative rule or through individual hearing. Ohio R.C. § 2967.16.

6. Pardon and Parole ⇐71, 86

State Parole Authority has power to address cases in which parolee has been convicted of another felony while on parole by means of administrative rule, rather than individual hearing, which includes power to find that no mitigating circumstances would overcome subsequent conviction of another felony committed while on parole so that individual hearing is not necessary. Ohio R.C. § 2967.16.

7. Pardon and Parole ⇐72.1, 86

Parole Authority does not have to have discretion as to whether to revoke parolee's parole status, but, if it has that discretion, revocation hearing is required.

8. Constitutional Law ⇐272.5
Pardon and Parole ⇐85, 90

Ohio parole procedures which did not allow individual hearing for parolees once subsequent parole violation conviction is established and which did not allow parole agency to consider further mitigating factors was constitutional and did not violate parolee's due process rights. U.S.C.A. Const. Amends. 5, 14.

9. Constitutional Law ⇐199

To establish ex post facto violation, plaintiffs must show that regulation at issue is retroactive in its application and will disadvantage offender affected by it. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

10. Constitutional Law ⇐199

Focus in determining whether new law violates ex post facto clause is time that offense was committed. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

11. Constitutional Law ⇐199

Change in law that alters substantial right can be ex post facto even if statute takes seemingly procedural form. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

12. Constitutional Law ⇐203
Pardon and Parole ⇐86

For purposes of determining whether new state parole procedures violated ex post facto clause, fact that change in right to hearing on revocation of parole involved procedural matter did not change fact that new law affected substantive rights attendant to parole revocation, so that ex post facto violation was possible. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

13. Constitutional Law ⇐203
Pardon and Parole ⇐86

Although new state parole regulations affected parolee's substantive rights by changing entitlement to individual revocation hearing, regulations were not ex post facto violation as to inmates whose paroles were revoked after hearing under old regulations or as to those who committed initial crime after date of enactment. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

14. Pardon and Parole ⇐86

New state parole regulations which eliminated parolee's right to individual hearing where parolee was convicted of felony while on parole could not be applied to parolees who committed initial crime before new regulations came into effect but whose parole revocation proceedings would occur after new procedures were to take effect.

Kenneth R. Spiert (argued and briefed), Public Defender's office, Ohio Public Defender Com'n, Columbus, OH, for plaintiffs-appellants.

Donald A. Cataldi (briefed) and Charles L. Wille (argued), Office of the Atty. Gen. of Ohio, Columbus, OH, for defendant-appellee.

Before: KEITH, WELLFORD, and DAUGHTREY, Circuit Judges.

1. Kellogg's probation had been revoked after he was convicted of new felonies (Attempted Grand Theft, Possession of Criminal Tools, Breaking and Entering, and Drug Abuse with prior drug law conviction) while on parole.

WELLFORD, Circuit Judge.

Glenn S. Kellogg ("Kellogg"), an Ohio prison inmate, initiated a 42 U.S.C. § 1983 class action suit in 1990 seeking declaratory and injunctive relief with respect to certain Ohio parole revocation procedures.

This case began in federal court in August 1990, when Kellogg [1] filed a pro se complaint alleging, under 42 U.S.C. § 1983, that the Ohio Parole Revocation procedures violated his procedural due process rights. The Ohio public defender, who began representing Kellogg, moved to certify a class to challenge certain parole revocation procedures. The district court certified the class to include "all persons whose parole was, or will be, revoked by the Ohio Adult Parole Authority through a so-called parole-violator recommissioned hearing because they have been convicted of a new felony committed while on parole."

The provisions of Ohio law now under attack are the new "emergency" provisions that the Ohio Adult Parole Authority ("agency") enacted effective September 1, 1992. Originally, the class brought its action against the older repealed provisions, which were discretionary and would have required Ohio to provide parolees with a "meaningful" hearing prior to revoking their parole.[2] Under these old regulations, a parolee convicted of a subsequent crime in Ohio, while on parole, was conclusively presumed to be in violation of his parole. The parolee under the old regulations, however, was entitled to a hearing to present any relevant mitigating circumstances. Although plaintiff parolees seem to concede they were given a "hearing" under the old regulations, they argued that it did not meet the procedural requirements that *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), required. The district court agreed with their argument, holding that the parolees did not receive sufficient notice, were denied the assis-

2. Section 5120:1-1-19(I) provided: "In the event a releasee is convicted and sentenced on a new felony under Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 has been violated."

tance of counsel, and were not permitted to call or to subpoena witnesses.

The agency then repealed the old regulations and implemented new ones. The new regulations did away with any type hearing if the defendant was convicted by an Ohio court "for an offense he committed while on any release granted by the Adult Parole Authority...." There would no longer be a hearing to determine mitigating circumstances surrounding the revocation. The only process the parolees would receive would be the parole authority's verification "that the sentence was imposed for an offense that occurred while the prisoner was under release status."

The agency revised the parole procedures to eliminate any agency's discretion in deciding whether to revoke parole. *See Black v. Romano*, 471 U.S. 606, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985), which had indicated that the hearing procedures required in *Morrissey* were applicable only if the parole board exercised discretion in revoking parole. *See also Sneed v. Donahue*, 993 F.2d 1239 (6th Cir.1993); *Harrison v. Parke*, 1990 WL 170428 (6th Cir.).

The district court then granted summary judgment in favor of the agency, sustaining its reliance on the amended regulation. The district court held that the new policy rendered the plaintiffs' challenges moot. The district court refused to amend its judgment and refused to grant plaintiffs any relief. The district court discussed rejecting the merits of the plaintiffs' constitutional challenges to the new regulations.

Plaintiffs appeal in order to challenge the district court's holding that the change in the parole procedures rendered the plaintiffs' constitutional challenges moot. Plaintiffs contend that the agency violated its rule-making powers by adopting the new procedures. Plaintiffs also argue that this court should reconsider *Sneed v. Donahue*, which held that a parole board was not required to provide the parolee with a hearing if the board exercised no discretion in revoking parole. Last, they wish to challenge the constitutionality of the new regulations, arguing that the change of the parole procedures in this respect constitutes a violation of the *ex post facto* clause.

I. *JURISDICTION AND STANDARD OF REVIEW*

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 since there is an appeal from a final order of the district court. The appropriate standard of review is *de novo* because the appeal concerns issues of law.

II. *MOOTNESS*

There is some confusion as to whether the district court held that the plaintiffs' constitutional challenges to the *new* procedures were moot. The district court discussed the constitutional merits of the plaintiffs' arguments, but refused to amend the court's judgment dismissing the claims of plaintiffs:

> Plaintiffs now seek to amend this Court's judgment, arguing that the application of OAC § 6120:1-1-21 to members of the plaintiff class whose parole had been revoked under the old regulation violates the constitutional prohibition against *ex post facto* laws.... As this court ruled in its *Opinion and Order* entered May 27, 1993, the relevant analysis turns to whether or not plaintiffs' claims for relief are moot. Plaintiffs' sole claim for injunctive relief sought to restrain defendants from violating plaintiffs' procedural due process rights in the future through the use of constitutionally infirm PVR hearing or procedures. Plaintiffs no longer have any procedural due process rights to a meaningful hearing in connection with felonies committed after the effective date of the new regulation. Accordingly, the enactment of OAC § 120:1-1-21 has rendered plaintiffs' claims for future injunctive relief moot.

[1] The plaintiffs do not contest the mootness of their challenges to the original procedures.[3] Plaintiffs argue, however, that they should be allowed to challenge the constitutionality of the *new* parole procedures.

We note that considerable controversy surrounds the mootness doctrine after *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). One rationale holds that the mootness doctrine is fundamentally tied to the case and controversy language of Article III, and, therefore, the court may only review if there is a justiciable issue. Another view is that the mootness doctrine is more flexible, and may be used to accomplish prudential concerns to avoid the squandering of judicial resources after the decisional process is underway. *See* Corey C. Watson, *Mootness and the Constitution*, 86 Nw.U.L.Rev. at 143.

[2] Under either rationale, the plaintiffs' challenge to the new procedures are not moot. The parole authority may not be allowed to abort or delay constitutional review of the parole procedures by substitution of a new procedure on the eve of adjudication. Prudential concerns also require us to hear this case rather than to dismiss it as moot as to those plaintiffs who are alleged to have committed offenses and had their paroles revoked prior to September 1, 1992. We conclude that a "case or controversy" exists, and that plaintiffs have raised proper concerns about the regulations' constitutionality as applied to offenses which occurred prior to the date of the amendment.

III. *DISCUSSION*

A. *Whether the agency violated its rule-making authority by adopting the new parole revocation procedures?*

The plaintiffs make two arguments in this respect. First, the plaintiffs argue that parole authority only has power to make administrative rules and not broad legislative policy rules. Second, the plaintiffs argue that even if the parole authority has the power to make broad policy rules, the new regulations conflict with Ohio statutes.

[3] The plaintiffs' first argument is unavailing. The Ohio parole authority is charged with administering all statutes relating to parole, *see* O.R.C. § 2967.02, including determining whether a convict has violated parole. O.R.C. § 2967.15. The parole authority has a long history of making regulations governing parole revocation. It should be noted that the plaintiffs did not contest the authority's power to issue the old regulations; they only challenged the *application* of the old regulations, arguing that a hearing to present mitigating circumstances was not a "meaningful hearing."

[4] Second, plaintiffs argue that the new parole revocation procedures are inconsistent with § 2967.15 of the Ohio Code, which requires that a parolee be given an individual parole revocation hearing when a *parole officer* has begun the parole revocation hearing on his own initiative. This case, however, does not involve a situation in which the parole officer has begun the parole revocation proceedings on his own initiative, or based on his charge or conduct, which has not resulted in a conviction.[4] Instead, this case is governed by a different provision of § 2967.15.

[5, 6] The legislature has *not* specifically required an individual hearing when the basis for the parole revocation is a subsequent conviction. The statute provides only: "A convict who has been conditionally pardoned or a prisoner who has been paroled, and who, in the judgment of the adult parole authority, has violated the condition of his pardon or parole shall be declared a violator." O.R.C. § 2967.15. Thus, the agency can "declare" a parolee to have been convicted of a subse-

3. It is apparent that the changes in the parole procedure rendered the plaintiffs' challenges to the original procedures moot. There is no need for this court to issue an injunction when the parole board has voluntarily changed its allegedly unconstitutional practices. *See Cotton v. Mansour*, 863 F.2d 1241, 1244-45 (6th Cir.1988), *cert. denied*, 493 U.S. 1042, 110 S.Ct. 835, 107 L.Ed.2d 831 (1990) (refusing to enjoin a social service agency's calculation of food stamp eligibility after the agency changed its practice to comply with federal regulations because "[t]here was simply no ongoing violation ... to enjoin"). *See also* Corey C. Watson, Comment, *Mootness and the Constitution*, 86 Nw.U.L.Rev. 141, 147 (1991). Any remedy that a member of the class has for the unconstitutional application of the old parole procedures must, in the future, be obtained through habeas corpus.

4. The parole authority does conduct an individual hearing in these circumstances.

quent violation while on a parole to be a "violator" either by administrative rule or through an individual hearing. The agency has chosen to address these cases by administrative rule, which is logical as those parolees who have been *convicted* of another felony while on parole have already had a trial or hearing to determine whether they actually committed the offense charged.[5] The agency has also concluded, by administrative rule, that no mitigating circumstances would overcome a subsequent conviction of another felony committed while on parole; thus, an individual hearing would be unnecessary. The agency's conclusion is a permissible one, as we have articulated previously in *Sneed v. Donahue*, 993 F.2d 1239 (6th Cir.1993). We find no merit, therefore, in plaintiffs' contentions in this regard.

B. *Whether this court should reconsider its decision in Sneed v. Donahue.*

Alternatively, plaintiffs ask us to reconsider our decision in *Sneed v. Donahue*, 993 F.2d 1239 (6th Cir.1993), in which we upheld the constitutionality of the Kentucky Parole statutes that eliminated any hearing on parole violation if the parolee was convicted of a new felony while on parole. The Kentucky and proposed Ohio parole revocation statutes are identical in that each statute eliminates agency discretion and directs revocation when a parolee has been convicted of a subsequent violation while on parole.

[7] We held in *Sneed* that the parolee "had no clearly established right to a parole revocation hearing" once a subsequent parole violation conviction had been established and the law gave the parole agency no authority to consider further mitigating factors.

> The Supreme Court in *Morrissey* [*v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)] clearly instructed that the purpose of a final revocation hearing is to give the parolee an opportunity to present facts challenging the determination that he has violated a condition of parole and to present all circumstances surrounding the violation to the parole authority so that it may exercise *its discretion* in a fully informed manner. In this case, however, a revocation hearing would serve no such purposes. It is undisputed that Sneed violated a condition of his parole and has met all the factual predicates required by Ky.Rev. Stat. § 439.362 before that section can be applied to him. In addition, it would be pointless for him to present mitigating circumstances to the Board since the Board has *no discretion* in determining whether to revoke his parole status....

Sneed, 993 F.2d at 1243 (emphasis in original). Our conclusion in *Sneed* is supported by *Black v. Romano*, 471 U.S. 606, 612, 105 S.Ct. 2254, 2258, 85 L.Ed.2d 636 (1985), in which the Supreme Court stated that

> [n]either *Gagnon* [*v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)] nor *Morrissey* considered a revocation proceeding in which the factfinder was required by law to order incarceration upon finding that the defendant had violated a condition of probation or parole. *Instead, those cases involved administrative proceedings in which revocation was at the discretion of the relevant decision maker.*

Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the factfinder in a revocation proceeding must, as a matter of due process, be granted discretion to continue probation or parole. Thus, *Black* teaches that *Morrissey* does not require that a parole authority be given discretion regarding when to revoke a parolee's parole status; rather, it simply requires that when such discretion is given, a revocation hearing is required. *Sneed*, 993 F.2d at 1243, 1244.

[8] As pointed out also in *Sneed*, two other courts have reached this same result: *United States v. Cornog*, 945 F.2d 1504 (11th Cir.1991); *Pickens v. Butler*, 814 F.2d 237 (6th Cir.), *cert. denied*, 484 U.S. 924, 108 S.Ct. 284, 98 L.Ed.2d 245 (1987). We have no occasion (or authority) to revisit *Sneed*, and we decline plaintiffs' invitation to do so. Plaintiffs have, accordingly, shown no due process violation by the amended procedure adopted by defendants in Ohio. This procedure would apply to all situations in which a party or parolee was convicted of an offense after September 1, 1992.

5. Even under the old regulations, the parolee did not receive an individual hearing on every issue, because he was conclusively presumed to be a parole violator if he had been convicted of another felony while on parole. The only issue at the hearing was whether mitigating circumstances warranted leniency in revoking his parole.

C. *Whether the new parole regulations violate the ex post facto clause of the United States Constitution.*

[9] As to the *ex post facto* challenge, we have considered this challenge in two nonbinding parole guideline cases: *Persky v. Edwards*, 1986 WL 16754 at *3 (6th Cir.); *Ruip v. United States*, 555 F.2d 1331, 1335 (6th Cir.1977). This case, by contrast, involves binding regulations that are mandatory after September 1, 1992, and eliminates any discretion in the parole agency to consider mitigating circumstances. To establish the claimed *ex post facto* violation, plaintiffs must establish that the regulation at issue (1) is retroactive in its application, and (2) "must disadvantage the offender affected by it." *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981)). *See also Dale v. Haeberlin*, 878 F.2d 930, 935 (6th Cir.1989), *cert. denied*, 494 U.S. 1068, 110 S.Ct. 1528, 108 L.Ed.2d 767 (1990). In this case, the agency action in amending the pertinent regulation has the same effect as legislation for the purpose of *ex post facto* consideration.

[10] The focus in determining whether a new law violates the *ex post facto* clause is the time the offense was committed. *Weaver*, 450 U.S. at 31, 101 S.Ct. at 965. *See also Persky v. Edwards*, 1986 WL 16754 (6th Cir.) (*quoting Forman v. McCall*, 709 F.2d 852, 859 (3d Cir.1983)) ("[I]t is a fundamental principle of ex post facto jurisprudence that a court entertaining an ex post facto claim must focus upon the law in effect at the time of the offense for which a person is being punished."); *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170, 176 (7th Cir. 1979) ("[A]lthough parole eligibility is determined as of the date of sentencing for some purposes ... the ex post facto clause looks to the punishment annexed at the time the crime was committed.").

[11] Next we look to whether the new regulations are more onerous than the regulations in effect at the time this subclass committed their initial crime. The defendants, relying on *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), argue that the change is merely a procedural change, and does not affect the substantive rights of the plaintiff class. *See Dobbert*, 432 U.S. at 293, 97 S.Ct. at 2298 ("Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto."). Although the distinction between substance and procedure might sometimes be elusive, "a change in the law that alters a substantial right can be ex post facto 'even if the statute takes a seemingly procedural form.'" *Miller v. Florida*, 482 U.S. at 433, 107 S.Ct. at 2453. Although the change here involves a procedural matter—the right to a hearing on revocation of parole—it still affects substantive rights attendant to parole revocation. Under the old regulations, parole would be revoked for the full amount of time *unless* the inmate could convince the parole authority that mitigating circumstances warranted mercy. Under the new procedures, there is no opportunity to present these mitigating circumstances. This procedural change affects *substantive* rights.

[12-14] Thus, the new regulations may violate the *ex post facto* clause for a portion of the plaintiff class wherein described. The plaintiff class in this case has been defined broadly to include: "all persons whose parole was, or will be, revoked by the Ohio Adult Parole Authority through a so-called parole-violator recommissioned hearing because they have been convicted of a new felony committed while on parole." Obviously, the new regulations cannot be deemed to be an *ex post facto* violation as to those inmates whose paroles were revoked after a hearing under the old regulations, because the new parole regulations were not applied to them. Likewise, the statute is not *ex post facto* as

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to those who committed their "initial crime" [6] after the date of enactment (September 1, 1992). The district court's opinion, however, does not take into account those plaintiffs who committed their initial crime before the new regulations came into effect but whose parole revocation proceedings will be governed by the new regulations.[7] The new regulations are retroactive only to these members of this class.[8]

To the extent any plaintiff falls into this designated category, he is entitled under the old regulations to a meaningful hearing as described in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). We may only provide prospective injunctive relief in this present case to those inmates, if any, who had committed their initial crime prior to September 1, 1992, and whose parole may be revoked under the new regulations. Only these plaintiffs have a claim to injunctive relief.

IV. *CONCLUSION*

In summary, we **AFFIRM** the district court in all respects, except as to those prisoners, if any, who committed initial offenses prior to September 1, 1992, but whose parole revocation procedures will be governed by the new regulations. Likewise, we **REMAND** the *ex post facto* claim for the district court to provide prospective injunctive relief as to those limited members of the plaintiff class described in this opinion.

6. We use the term "initial crime" to refer to the crime from which the inmate has been paroled. It does not refer to the subsequent violation while on parole.

7. The district court concluded that the "defendants have not retroactively applied [the new regulations] to the subclass of plaintiffs whose parole had been earlier revoked...."

8. At oral argument, the Ohio Attorney General's office stated that there had been no such actions taken.

David Lee BOYES, Plaintiff-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, Defendant-Appellee.

No. 93-4012.

United States Court of Appeals, Sixth Circuit.

Argued Nov. 18, 1994.

Decided Dec. 13, 1994.*

Mentally impaired social security disability and supplemental security income (SSI) claimant filed complaint challenging final decision of Secretary of Health and Human Services denying benefits. The United States District Court, Northern District of Ohio, John M. Manos, J., affirmed Secretary's decision, and claimant appealed. The Court of Appeals, Suhrheinrich, Circuit Judge, held that: (1) claimant's past relevant work as roadside rest cleaner was not "substantial gainful activity," given special conditions under which he performed his work, and (2) administrative res judicata did not bar claimant from challenging prior determination that his roadside maintenance work constituted substantial gainful activity.

Reversed and remanded.

1. **Social Security and Public Welfare** ⇐143.40

Claimant bears burden of proving his entitlement to social security disability and supplemental security income (SSI) benefits. Social Security Act, § 205(g), as amended, 42 U.S.C.A. § 405(g).

2. **Social Security and Public Welfare** ⇐143.75

Social security disability and supplemental security income (SSI) claimant's past relevant work as roadside rest cleaner was not "substantial gainful activity," given special conditions under which he performed his work; adult services director at workshop purported that claimant's productivity was less than one half that of typical nonimpaired person, and claimant relied on special transportation to get to and from work and completed his work duties through constant on-site supervision. Social Security Administration Regulations, 20 C.F.R. §§ 404.1520(e), 404.1573(b, c), 42 U.S.C.A.App.; 20 C.F.R. § 416.920(e).

3. **Administrative Law and Procedure** ⇐501

Social Security and Public Welfare ⇐142.20

Administrative res judicata did not bar social security disability and supplemental security income (SSI) claimant from challenging prior determination that his prior roadside maintenance work constituted "substantial gainful activity"; record showed that ALJ reopened merits of that decision in reviewing benefits claim.

Marcia W. Margolius (argued and briefed), Brown & Margolius, Cleveland, OH, for plaintiff-appellant.

Kent W. Penhallurick, Asst. U.S. Atty., Cleveland, OH (argued and briefed), for defendant-appellee.

Before: KENNEDY and SUHRHEINRICH, Circuit Judges; and ZATKOFF, District Judge.**

SUHRHEINRICH, Circuit Judge.

David Boyes appeals the district court's judgment affirming the Secretary's final decision denying Boyes' application for disability insurance benefits and supplemental security income (SSI) under the Social Security Act. For the following reasons, we REVERSE and REMAND for an award of benefits.

I.

Boyes received disabled child's insurance benefits because of a mental impairment (full scale IQ of 59) based on a May 10, 1976 application. In May of 1974, Boyes entered a sheltered workshop, and after the Secretary determined in May 1986 that his work as a roadside rest cleaner constituted substantial gainful activity, the benefits were terminated. The termination letter indicated that Boyes' earnings exceeded the $300 per month level presumed to indicate substantial gainful activity. *See* 20 C.F.R. § 404.1574(b)(2)(vi). Boyes never sought review of this determination.

In January 1989, Boyes filed for SSI, disabled child's benefits and disability insurance benefits. He alleged disability since June 1988, based on mental impairment. The Secretary denied all three applications on May 8, 1989. Boyes failed to seek review; however, in September 1989, he filed second applications for disability insurance benefits and SSI. Boyes alleged that he became unable to work on May 10, 1989 (disability insurance applications), and August 29, 1989 (SSI application), because of mild mental retardation and health problems, including tracheobronchitis, hiatal hernia and a hole in his heart. The applications were denied, and Boyes filed a complaint in district court. The district court affirmed the Secretary's decision.

Boyes contends that the district court erred because the evidence was insufficient to show he possessed the residual functional capacity to engage in employment at a competitive level. According to Boyes, his past relevant work did not constitute substantial gainful activity. Therefore, he asserts his burden of proving an entitlement to benefits has been fulfilled.

II.

[1] On review, the Secretary's factual findings are conclusive when supported by

* This decision was originally issued as an "unpublished decision" filed on December 13, 1994. On January 18, 1995, the court designated the opinion as one recommended for full-text publication.

** The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

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NO. 93-4287

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLENN S. KELLOGG; LANI R. SMITH; JOHN STAMPER; LAWRENCE DESSENBERG; ROBERT DONLEY; MICHAEL JONES; MICHAEL KARHOFF; DANIEL SCHREIBER, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. JOHN W. SHOEMAKER, ET AL., Defendants-Appellees.	)	FILED FEB 28 1995 LEONARD GREEN, Clerk ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: KEITH, WELLFORD, and DAUGHTREY, Circuit Judges.

ORDER

The parties in this case have called the court's attention to an inconsistency in the body of our opinion filed January 9, 1995, by filing petitions for rehearing. Upon consideration, we shall revise the opinion by striking therefrom the phrase, "and also a parole violation offense conviction" from the first sentence of "IV. *CONCLUSION*," p. 12. We shall also strike this phrase from line three of the Judgment in this case entered January 9, 1995. Both petitions for rehearing are DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Jr.
CLERK

Mag. Judge
Docketed
5-30-03

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

03 MAY 27 PM 1:14
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

GLENN S. KELLOGG, et al.,

Plaintiffs,

vs. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,

Defendants.

OPINION AND ORDER

Plaintiffs, inmates whose parole has been revoked by the Ohio Adult Parole Authority ["APA"], bring this action on behalf of themselves and of a class of plaintiffs for prospective declaratory and injunctive relief pursuant to 42 U.S.C. §1983, alleging that defendants denied them procedural due process under the Fourteenth Amendment during the course of their final parole revocation proceedings. This matter is now before the Court on the parties' cross-motions for summary judgment.

The plaintiff class is composed of parolees whose parole has been or will be revoked because they have been convicted of a subsequent felony committed while on parole. Referred to by the APA as Parole Violator Recommissioned ["PVR"], each inmate was provided a final parole revocation hearing. The regulation governing those hearings, Ohio Administrative Code ["OAC"] §5120:1-1-19(A)(1), provided that the subsequent felony conviction creates a conclusive presumption that the inmate has violated his parole, and that the scope of the final revocation hearing would be

strictly limited to the issue of mitigation.[1] Plaintiffs claim that their procedural due process rights have been abridged in several respects by the manner in which their PVR hearings were held. Plaintiffs and defendants have filed motions for summary judgment.

Summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure, which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

"[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original); Kendall v. The Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984).

The standard to be applied by the Court on motion for summary judgment mirrors the standard for a directed verdict.

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[1]OAC §5120:1-1-19(A)(1) provides:

> In the event a releasee is convicted and sentenced on a new felony under Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 [providing that all the conditions of parole include a requirement that the parolee abide by all federal, state and local laws] has been violated. In such cases, as applicable, the parole revocation hearing will be confined to the determination of mitigating circumstances.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson, 477 U.S. at 250.

> The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted. Bill Johnson's Restaurants Inc. v. NLRB, 461 U.S. 731, 745 n.11 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Id. at 251-52. Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules which are designed "to secure the just, speedy and inexpensive determination of every action." Celotex, 477 U.S. at 327 (quoting Rule 1 of the Federal Rules of Civil Procedure).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (footnote omitted); accord, Adams v. Union Carbide Corp., 737 F.2d 1453, 1455-56 (6th Cir. 1984), cert. denied, 469 U.S. 1062 (1985). Inferences to be drawn from the underlying facts contained in such materials must be considered in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Watkins v. Northwestern Ohio Tractor Pullers Association, Inc., 630 F.2d 1155, 1158 (6th Cir. 1980).

Additionally, "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. Adickes, 398 U.S. at 157-60; Smith v. Hudson, 600 F.2d 60, 65 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979).

If the moving party meets its burden and if adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 326. The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. Anderson, 477 U.S. at 251 (quoting Improvement Co. v. Munson, 14 WALL. 442, 448 (1872)). As is provided in Fed. R. Civ. P. 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Thus, "a party cannot rest on the allegations contained in his ... [pleadings] in opposition to a properly supported motion for summary judgment against him." First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 259 (footnote omitted).

The process due parolees charged with violating

conditions of their parole has changed over time. The United States Supreme Court first held, in Morrissey v. Brewer, 408 U.S. 471 (1972), that a parolee's "liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." Id., 408 U.S. at 482.

First, the Supreme Court held, a parolee is entitled to prior notice and a reasonably prompt informal inquiry, conducted by an impartial hearing officer, to determine if there is reasonable ground to believe that the arrested parolee has violated a parole condition. At this preliminary revocation hearing, the parolee is entitled to present relevant information and to question adverse witnesses unless security considerations indicate otherwise. The neutral hearing officer must summarize the evidence and state the reasons for his decision. Id., 408 U.S. at 484-87.

If probable, or reasonable, cause is found to believe that the parolee has violated one or more conditions of his parole, the parolee is then entitled to a final revocation proceeding before a neutral and detached hearing body. The parolee must have been given written notice of the claimed violations and must be advised of the evidence against him. He may be entitled to counsel and must be afforded an opportunity to be heard in person and to present witnesses and documentary evidence. He also has the right to confront and examine adverse witnesses unless security considerations militate against this. A written statement of the evidence relied on and reasons for revoking parole must be

provided. Id., 408 U.S. at 487-90. See also Gagnon v. Scarpelli, 411 U.S. 778 (1973) [extending the same due process protections to persons charged with violating conditions of probation].

Thereafter, the United States Court of Appeals for the Sixth Circuit commented that, "The automatic revocation of parole for every parole violation, regardless of the mitigating circumstances, clearly runs counter to the dictates of ... Morrissey v. Brewer." Preston v. Piggman, 496 F.2d 270, 275 n.1 (1974). The Court held specifically in Moss v. Patterson, 555 F.2d 137 (6th Cir.), cert. denied sub nom. Kette v. Moss, 434 U.S. 873 (1977), that a final revocation proceeding consistent with the dictates of Morrissey v. Brewer must be afforded even parolees convicted of a subsequent felony.

Plaintiffs in this case challenge the constitutional sufficiency of the final revocation proceedings afforded to PVRs in Ohio under OAC §5120:1-1-19(A)(1). The evidence currently before the Court indicates that hearings held at the correctional institution before the parole panel pursuant to O.A.C. §5120:1-1-19(A)(1) failed to provide to PVRs notice sufficient to enable them to marshall witnesses or other information for presentation in mitigation. Moreover, PVRs are denied the assistance of counsel and are not permitted to call or to subpoena witnesses to testify on their behalf at the final hearing. Although documentary evidence submitted in mitigation by the PVR will ordinarily be accepted by the parole panel, the panel does not take into account such information in determining whether or not the PVR's parole

status should be revoked. Finally, the parole panels exercise no discretion in whether or not to revoke the PVR's parole. In this regard, the prevailing view among state officials is that parole panels have no discretion to take any action other than revocation of parole until after the minimum term of imprisonment on the new felony conviction has been served.

Defendants contend, first, that the procedures followed under OAC §5120:1-1-19(A)(1) do not contravene any constitutional dictates because PVRs, who are already in custody on the new conviction, do not in fact qualify as parolees. Accordingly, defendants argue, no action taken by parole officials can result in the deprivation of the PVRs' liberty. This argument is specious.

The United States Court of Appeals for the Sixth Circuit has specifically recognized that PVRs in Ohio are entitled to a final revocation hearing consistent with Morrissey and Gagnon. Inmates' Councilmatic Voice v. Rogers, 541 F.2d 633 (6th Cir. 1976). Moreover, Moody v. Daggett, 429 U.S. 78 (1976), made clear that a parolee's incarceration on an entirely new charge is not co-extensive with the revocation of his parole. Finally, it is indisputable that the actual result of the final parole revocation hearing is the panel's revocation of the PVR's parole.

Defendants have now, however, substituted OAC §5120:1-1-19(A)(1) with OAC §5120:1-1-21, which provides, in pertinent part:

> (A) The Adult Parole Authority shall revoke the release of any releasee who is recommitted to the Department of Rehabilitation and Correction to serve a sentence imposed upon him by any court in Ohio for an offense he committed while on any release granted by the

> Adult Parole Authority or while serving a period of intermediate transitional detention pursuant to Rule 5120-11-12 of the Administrative Code or serving a period of parole supervision pursuant to Rule 5120-11-19 of the Administrative Code.
>
> (B) This revocation shall be accomplished by the issuance of minutes by the Adult Parole Authority after it has been verified that the sentence was imposed for an offense that occurred while the prisoner was under release status (emphasis added).

Thus, unlike former OAC §5120:1-1-19(A)(1), the currently controlling regulation, OAC §5120-1-1-21, no longer allows the APA any discretion as to whether or not to revoke the parole of a PVR. The revocation is effected simply upon verification by the APA that the PVR has been convicted of another criminal offense committed while on parole, and the declaration of revocation by the APA by means of the "issuance of minutes."

In Black v. Romano, 471 U.S. 606 (1985), the United States Supreme Court distinguished statutory or regulatory schemes that vested discretion in a parole authority in the revocation process from those that did not:

> [N]either Gagnon nor Morrissey considered a revocation proceeding in which the factfinder was required by law to order incarceration upon finding that the defendant had violated a condition or probation or parole. Instead, those cases involved administrative proceedings in which revocation was at the discretion of the relevant decisionmaker. (citations omitted). Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the factfinder in a revocation proceeding must, as a matter of due process, be granted discretion to continue probation or parole (emphasis added).

Id., 471 U.S. at 612. As a result, what had been perceived to be an unconditional right to a parole revocation hearing with certain due process safeguards now seems to turn on whether or not discretion is reposed in the factfinder.

All of the judicial authority after Black v. Romano has held that, if the decisionmaker retains any discretion in determining whether or not parole should be revoked, the procedural safeguards of Morrissey must be followed. On the other hand, if discretion is lacking and the revocation of parole is automatic once the fact of a subsequent conviction is established, a parolee is afforded no further due process safeguards and, indeed, no revocation hearing. Pickens v. Butler, 814 F.2d 237, 239 (5th Cir.), cert. denied, 484 U.S. 924 (1987); Alevras v. Neubert, 727 F.Supp. 852, 853-54 (S.D. N.Y. 1990); Witzke v. Withrow, 702 F.Supp. 1338, 1351 (W.D. Mich. 1988). See also United States v. Cornec, 945 F.2d 1504, 1512-13 (11th Cir. 1991). The operative question here, then, is whether Ohio currently vests any discretion in the parole panel in determining whether or not a PVR's parole will be revoked. The plaintiff class contends that Ohio law does. Specifically, plaintiffs argue that the parole board may effectively continue parole simply "[b]y not verifying the facts or by not issuing the minutes, or by delaying either act, ..." Plaintiffs' Reply to Defendants' Memorandum Contra Plaintiff Class' Motion for Summary Judgment, at 12. See also United States v. Cornec, 945 F.2d 1504. However, this argument ignores the specific language of OAC §5120:1-1-21(A), which requires that the APA "shall

revoke the release" of any parolee recommitted to the Ohio Department of Rehabilitation and Correction to serve a sentence imposed upon him for an offense committed while on parole (emphasis added).

Plaintiffs also contend that, regardless of OAC §5120-1-1-21, the APA is vested with discretion by virtue of O.R.C. §2967.17, which provides:

> The adult parole authority may, in its discretion, grant an administrative release:[2]
>
> (A) To a parole violator serving another felony sentence in a penal institution within or without this state for the purpose of consolidation of the records or where justice would be best served;
>
> (B) To a parole violator at large whose case has been inactive for at least ten years following the date of declaration of parole violation.
>
> An administrative release shall not be granted except upon the concurrence of a majority of the parole board and approval of the chief of the adult parole authority and shall not operate to restore the rights and privileges forfeited by conviction as provided in section 2961.01 of the Revised Code. Any person granted an administrative release under this section may subsequently apply for a commutation of sentence for the purpose of regaining the rights and privileges forfeited by conviction.

See State v. Dean, 1986 WL 9071 (Ross Cty. App. 1986) [an Ohio parolee was administratively released from parole following his sentence to life imprisonment in another state]. The statute

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[2]"Administrative release" is defined as "a termination of jurisdiction over a particular sentence by the [APA] for administrative convenience." O.R.C. §2967.01(C).

does not vest any discretion in the APA or its panels in connection with the revocation of a PVR's parole. Accordingly, OAC §5120:1-1-21, which does divest all discretion from the APA in this regard, is not inconsistent with this statute.

Plaintiffs also take the position that OAC 5120:1-1-21 is ineffective because it is inconsistent with Ohio statutory law. In Ohio, an agency "may not issue rules which are unreasonable or are in clear conflict with statutory enactment covering the same subject matter." Carroll v. Department of Administrative Services, 10 Ohio App. 3d, 108, 110 (1983). Plaintiffs take the position that OAC §5120:1-1-21, which purports to divest the APA of all discretion where the issue of revocation of PVRs is concerned, is inconsistent with ORC §2967.15, which provides, in pertinent part:

> A convict who has been conditionally pardoned or a prisoner who has been paroled, and who, in the judgment of the adult parole authority, has violated the conditions of his pardon or parole shall be declared a violator. In such case, the time from the date of the declared violation of his pardon or parole to the date he becomes available for return to the institution shall not be counted as a part of time or sentence served.

The Ohio APA is charged with administering all statutes relating parole. O.R.C. §2967.02. Read together, O.R.C. §§2969.02 and .15 reflect the General Assembly's intent to confer upon the APA the authority to determine those circumstances under which a person released on parole should be declared a violator and returned to the institution from which he was paroled. The statutes do not require that individual members of the APA or that panels of the APA exercise that discretion in each individual case. Accordingly,

a regulation such as OAC §§5120:1-1-21, which expressly articulates one circumstance under which the APA will revoke a parolee's parole, is not, in the judgment of this Court, inconsistent with ORC §2967.15.

In short, then, this Court concludes that OAC §§5120:1-1-21 is a valid exercise of rule-making authority and serves to divest individual APA panels of discretion in the decision whether or not to revoke a PVR's parole.

Because, under the new administrative regulation, individual parole panels no longer have discretion with respect to the revocation of the parole of any PVR, the due process protections afforded parolees by Morrissey v. Brewer are no longer applicable. See Pickens v. Butler, 814 F.2d 237. See also United States v. Cornog, 945 F.2d 1504 (11th Cir. 1991); Black v. Romano, 471 U.S. 606.

Defendants contend that, with the passage of the new regulation, the issues in this case have been rendered moot. Plaintiffs disagree.

The second amended complaint, filed December 9, 1992, challenges the PVR revocation procedure in place at the time the complaint was filed, alleging specifically that that procedure violated the due process rights of the members of the plaintiff class. Plaintiffs seek declaratory relief declaring that the revocation procedure is unconstitutional by virtue of the facts that that procedure fails to give members of the plaintiff class reasonable and adequate notice of the scheduling of the PVR hearing

and of the PVRs' rights at the hearing, fails to provide a meaningful opportunity to present evidence and argument as to mitigation, and prohibits the exercise of discretion by the members of the Parole Board in light of mitigating factors. Second Amended Complaint, at 6. The plaintiffs also seek preliminary and injunctive relief

> restraining, prohibiting, and enjoining Defendants from approving, implementing, or enforcing PVR revocation procedures which deprive Plaintiffs and all others similarly situated of their Fourteenth Amendment due process rights.

Second Amended Complaint, at 7. As this Court stated, in its October 28, 1991 Opinion and Order denying the defendants' motion to dismiss, the plaintiff class in this action seeks only declaratory and future injunctive relief enjoining the defendants from following the challenged procedures. The Court specifically noted that this action did not, and indeed could not, challenge the lawfulness of the current confinement of any member of plaintiff class, because such an attack is properly brought only in the context of a habeas corpus action under 28 U.S.C. §2241. See Preiser v. Rodriguez, 411 U.S. 475 (1973). Because the procedures challenged by the second amended complaint no longer have any force or effect in the State of Ohio, this Court concludes that the issues joined by the second amended complaint and the answer thereto have, by passage of OAR §5120:1-1-21, been rendered moot. Accordingly, defendants are entitled to judgment as a matter of

law.[3]

WHEREUPON plaintiffs' motion for summary judgment is without merit and it is therefore DENIED. The claims asserted in the second amended complaint have been rendered MOOT by the passage of OAR §5120:1-1-21 and, for that reason, the defendants' motion for summary judgment is meritorious and it is therefore GRANTED.

The Clerk is DIRECTED to enter FINAL JUDGMENT for the defendants.

Sandra S. Beckwith, Judge
United States District Court

[3]This determination does not, of course, impact upon the right of any member of the plaintiff class to challenge, in a petition for a writ of habeas corpus, the constitutionality of his current confinement under former procedures.

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

Southern District of Ohio

KENNETH J. MURPHY
93 MAY 28 AM 10:00
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

GLENN S. KELLOGG, et al

JUDGMENT IN A CIVIL CASE

vs

Case No. C2-90-606

Judge Beckwith
Magistrate Judge King

JOHN W. SHOEMAKER, et al

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiffs' motion for summary judgment is DENIED. Defendants' motion for summary judgment is GRANTED. FINAL JUDGMENT is entered for the defendants.

Date: May 28, 1993

Kenneth J. Murphy, Clerk

Peg Lambert

By Peg Lambert /Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GLENN S. KELLOGG, et al.,

Plaintiffs,

vs. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,

Defendants.

OPINION AND ORDER

Plaintiffs, a class of inmates whose parole was revoked by the Ohio Adult Parole Authority ["APA"], brought this action on behalf of themselves and of a class of plaintiffs, for prospective declaratory and injunctive relief pursuant to 42 U.S.C. §1983, alleging that defendants denied them procedural due process under the Fourteenth Amendment during the course of plaintiffs' revocation proceedings. On May 27, 1993, this Court granted summary judgment in favor of defendants. Opinion and Order of May 27, 1993. Final judgment was entered on May 28, 1993. This matter is now before the Court on plaintiffs' motion to alter or amend that judgment, Rule 59(e), Fed. R. Civ. P., and on plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order denying plaintiffs' Rule 16(f) motion for sanctions against defendants. Rule 72, Fed. R. Civ. P.

The plaintiff class consists of parolees who were convicted of a subsequent felony while on parole, and whose parole was subsequently revoked as a parole violator recommissioned

["PVR"]. Plaintiffs originally claimed that their PVR hearings failed to comport with procedural due process. They asked that the Court declare that defendants' PVR procedures violated plaintiffs' procedural due process rights, Second Amended Complaint, and enjoin defendants from following PVR procedures violative of plaintiffs' procedural due process rights. Id.

During the course of this litigation, Ohio Administrative Code ["OAC"] §5120:1-1-19(A)(1), the former administrative regulation dealing with PVR procedures, was repealed and OAC §5120:1-1-21 was implemented. After evaluating this new regulation by reference to Black v. Romano, 471 U.S. 606 (1985), this Court concluded that OAC §5120:1-1-21, which divested the Ohio Adult Parole Authority ["APA"] of all discretion regarding the revocation of a PVR's parole, is constitutional. Opinion and Order of May 27, 1993. See also Sneed v. Donahue, 993 F.2d 1239, 1243 (6th Cir. 1993). The Court further held that, because the procedures challenged in the second amended complaint were no longer in effect, the case has been rendered moot. Opinion and Order of May 27, 1993. Final judgment for defendants was entered on May 28, 1993.

Plaintiffs now seek to amend this Court's judgment, arguing that the application of OAC §5120:1-1-21 to members of the plaintiff class whose parole had been revoked under the old regulation violates the constitutional prohibition against ex post

facto laws. See Article I, Section 10, United States Constitution.[1]

In order to demonstrate a violation of the ex post facto clause contained in the United States Constitution, plaintiffs must establish that the law at issue 1) is retroactive in application and 2) "must disadvantage the offender affected by it." Miller v. Florida, 482 U.S. 423, 430 (1987) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)); Dale v. Haeberlin, 878 F.2d 930, 935 (6th Cir. 1989), cert. denied, 494 U.S. 1058 (1990). The new regulation has not been applied to remedy any defect in the revocation procedures followed in the past. Accordingly, defendants have not retroactively applied OAC §5120:1-1-21 to the subclass of plaintiffs whose parole had been earlier revoked pursuant to former OAC §5120:1-1-19(A)(1). Defendants cannot, and do not, argue that this subclass of plaintiffs will be subjected to OAC §5120:1-1-21. Accordingly, plaintiffs have failed to establish an ex post facto violation in this action.

As this Court ruled in its Opinion and Order entered May 27, 1993, the relevant analysis turns to whether or not plaintiffs' claims for relief are moot. Plaintiffs' sole claim for injunctive relief sought to restrain defendants from violating plaintiffs' procedural due process rights in the future through the use of constitutionally infirm PVR hearings or procedures. Plaintiffs no longer have any procedural due process rights to a meaningful

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[1]The Eleventh Amendment prevents this Court from considering claims under Ohio's Constitution. See Pennhurst State School and Hospital v. Haldeman, 465 U.S. 89 (1984).

hearing in connection with PVR parole revocation proceedings in connection with felonies committed after the effective date of the new regulation. Accordingly, the enactment of OAC §5120:1-1-21 has rendered plaintiffs' claims for future injunctive relief moot.

Plaintiffs assert that their claims for declaratory relief are not rendered moot by the enactment of OAC §5120:1-1-21. This Court disagrees. Where the plaintiffs "seek[] a declaratory judgment as to [the Parole] Board's past actions -- without any substantive relief involved -- neither the Declaratory Judgment Act standard (28 U.S.C. §2201) nor Article III's 'case' or 'controversy' requirement is satisfied." Jackson v. Illinois Prisoner Review Board, 657 F.Supp. 823, 827 (N.D. Ill. 1987), aff'd in part and rev'd in part, 856 F.2d 890 (7th Cir. 1988) (citing Green v. Mansour, 474 U.S. 64 (1985); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937)). To hold otherwise would constitute "an end run around habeas corpus procedures." Foster v. Kassulke, 898 F.2d 1144, 1148 (6th Cir. 1990). Declaratory relief evaluating the constitutionality of past procedures would be the functional equivalent of a habeas corpus action, and is not available in an action under 42 U.S.C. §1983. See Preiser v. Rodriguez, 411 U.S. 475 (1973).

Plaintiffs also disagree with this Court's rejection of their argument that defendants "exceeded their rule-making authority" when OAC §5120:1-1-21 was enacted. Plaintiffs' Motion to Alter or Amend May 28, 1993 Order, p. 15. This Court expressly held that "OAC §5120:1-1-21 is a valid exercise of rule-making

authority and serves to divest individual APA panels of discretion whether or not to revoke a PVR's parole." Opinion and Order of May 27, 1993, at 12. Plaintiffs' motion to alter or amend fails to persuade this Court that the judgment of May 28, 1993 was entered in error in this regard.

Finally, plaintiffs object, pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, to Magistrate Judge King's denial of plaintiffs' Rule 16(f) motion for sanctions against defendants. Notwithstanding plaintiffs' claims to the contrary, this Court concludes that Magistrate Judge King's conclusions that the circumstances in this action do not justify an award of fees or the preclusion of relevant evidence is neither clearly erroneous nor contrary to law. Accordingly, plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order are OVERRULED.

WHEREUPON plaintiffs' motion to alter or amend this Court's judgment of May 28, 1993 is without merit, and it is therefore DENIED. Plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order denying sanctions against defendants are without merit, and they are therefore OVERRULED.

Sandra S. Beckwith, Judge
United States District Court

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3-22-95

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
KENNETH J. MURPHY
CLERK
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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

GLENN S. KELLOGG, et al.,

Plaintiffs,

vs.

Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,

Defendants.

ORDER

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit.

Consistent with the mandate of the United States Court of Appeals for the Sixth Circuit, it is hereby ADJUDGED that application of Ohio Administrative Code §5120:1-1-21, to the extent applied to those members of the plaintiff class, if any, who committed initial offenses prior to the effective date of the regulation, i.e., September 1, 1992, but whose parole revocation procedures are conducted after September 1, 1992, constitutes an ex post facto law and its application to such persons is hereby ENJOINED. Those class members who committed their initial crime before September 1, 1992, but whose parole revocation proceedings are conducted after September 1, 1992, are entitled to the procedural safeguard outlined in Morrissey v. Brewer, 408 U.S. 471 (1972) and Moss v. Patterson, 555 F.2d 137 (6th Cir.), cert. denied, sub nom. Kette v. Moss, 434 U.S. 873 (1977).

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The Clerk shall enter final judgment accordingly.

Sandra S. Beckwith, Judge
United States District Court

5120:1-1-19 Revocation of release; institutional revocation hearing

(A) Within a reasonable period of time after a detainer has been filed against the releasee, or the holding of the hearing required by Administrative Regulation 5120:1-1-18, whichever is earlier, the releasee shall be granted a revocation hearing. A continuance may be granted by the Chairman of the Parole Board or designee upon application by the violator and for good cause shown.

(1) In the event a releasee is convicted and sentenced on a new felony under Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 has been violated. In such cases, as applicable, the parole revocation hearing will be confined to the determination of mitigating circumstances.

(2) The hearing for a releasee who has been convicted in a state other than the State of Ohio, and is being returned as a violator, shall be held within a reasonable period of time after his return to confinement within the boundaries of the State of Ohio.

(B) The hearing panel shall consist of a member or members of the Parole Board, any hearing officer, or any hearing body appointed by the Parole Board.

(C) The hearing shall be held pursuant to the procedure as set forth in Administrative Regulation 5120:1-1-18. Requests for witnesses and all motions for clarification of charges, suppression of evidence, and all other motions, shall be made at least ten (10) working days prior to the scheduled hearing unless such requirement is waived by the Chairman of the Parole Board or designee in whole or in part, and for good cause shown. Requests shall be made to the Chairman of the Parole Board or designee in lieu of the unit supervisor.

(D) If at the hearing it is found by substantial evidence, considering the record as a whole, that the alleged violation has been proved and that mitigating circumstances, if any, do not make revocation inappropriate, release shall be revoked by the Parole Board.

(E) If at the hearing there is no substantial evidence, considering the record as a whole, that the alleged violation has been proved, or if the hearing panel, in its discretion, determines that revocation of release is inappropriate even if the alleged violation has been proved, the inmate shall be released to his former status, provided, however, that in the discretion of the Parole Board the terms and conditions of release may be modified in order to assist the releasee in his adjustment to society and to his rehabilitation, pursuant to Administrative Regulation 5120:1-1-12.

OHIO ADMINISTRATIVE CODE, APPROVED EDITION5120 DEPARTMENT OF REHABILITATION AND CORRECTION5120:1 DIVISION OF PAROLE AND COMMUNITY SERVICESChapter 5120:1-1 Release

5120:1-1-21 REVOCATION OF RELEASE IF RELEASEE RECOMMITTED FOR NEW OFFENSE

(A) The adult parole authority shall revoke the release of any releasee who is recommitted to the department of rehabilitation and correction to serve a sentence imposed upon him by any court in Ohio for an offense he committed while on any release granted by the adult parole authority or while serving a period of intermediate transitional detention pursuant to *rule 5120-11-12 of the Administrative Code* or serving a period of parole supervision pursuant to *rule 5120-11-19 of the Administrative Code*.

(B) This revocation shall be accomplished by the issuance of minutes by the adult parole authority after it has verified that the sentence was imposed for an offense that occurred while the prisoner was under release status.

(C) If the prisoner was on release from a definite sentence only, is recommitted to serve a definite sentence or sentences, and is not serving any indefinite sentence, there shall be no further release consideration and the offender shall serve the balance of the aggregate definite sentence, diminished pursuant to *rules 5120-2-04* through *5120-2-08 of the Administrative Code*, unless the prisoner becomes eligible for release on furlough pursuant to *rule 5120:1-1-23 of the Administrative Code*.

(D) If the prisoner was on release from an indefinite sentence or one or more sentences for which he is recommitted is an indefinite sentence, he shall be scheduled for a parole release hearing when eligible pursuant to *rules 5120-2-03* through *5120-2-08* and *rule 5120:1-1-13 of the Administrative Code*.

OHIO REVISED CODE

2967.15 VIOLATION OF PARDON OR PAROLE

(A) Any adult parole authority field officer who has reasonable cause to believe that any parolee, furloughee, or other releasee under the supervision of the adult parole authority has violated or is violating any term or condition of his pardon, parole, furlough, or release may arrest the person without a warrant or order any peace officer to arrest the person without a warrant. A person so arrested shall be confined in the jail of the county in which he is arrested or in another facility designated by the chief of the adult parole authority until a determination is made regarding his release status. Upon making an arrest under this section, the arresting or supervising adult parole authority field officer promptly shall notify the superintendent of parole supervision or his designee, in writing, that the person has been arrested and is in custody and submit in detail an appropriate report of the reason for the arrest.

(B) Subsequent to the arrest of a parolee, furloughee, or other releasee pursuant to this section, the person shall be granted a hearing to determine whether he has violated the terms and conditions of his pardon, parole, furlough, or release and whether he should be returned to a state correctional institution, except that a parolee, furloughee, or other releasee who is convicted of or pleads guilty to any offense committed while on parole, furlough, or other release is not entitled to the hearing. A member of the parole board, a hearing officer, or other person designated by the chief of the authority shall conduct the hearing in accordance with rules adopted by the director of rehabilitation and correction.

If the person who conducts the hearing decides that the parolee, furloughee, or releasee does not have to return to a state correctional institution, he immediately shall be released, provided there are no unadjudicated criminal charges pending against him in this state.

If the person who conducts the hearing decides that the parolee, furloughee, or releasee should return to a state correctional instition [sic], the superintendent, within a reasonable time, shall order his return to an institution.

If a parolee is declared to be a violator of the conditions of his pardon, the authority forthwith shall transmit to the governor its recommendation concerning such violation and the violator shall be retained in custody until the governor issues an order concerning such violation.

If the authority fails to make a determination of the case of the parolee alleged to be a violator of the conditions of his pardon or parole within a reasonable time, the parolee shall be released from custody under the same terms and conditions of his original pardon or parole.

(C)(1) If a parolee, furloughee, or other releasee absconds from supervision, that fact shall be reported by the superintendent to the authority, in writing, and the authority shall enter an order upon its official minutes declaring that person to be a violator at large. The superintendent, upon being advised of the apprehension and availability for return of a violator at large, shall recommend to the authority that he be returned to the institution or restored to parole, furlough, or other release. If the violator is not restored to parole, furlough, or other release, he shall be returned to a state correctional institution.

The time between the date on which a parolee, furloughee, or other releasee is declared to be a violator or violator at large and the date on which that person is returned to custody in this state under the immediate control of the adult parole authority shall not be counted as time served under the sentence imposed on that person.

(2) A furloughee or any releasee other than a person who is released on parole or pardon is considered to be in custody while on furlough or other release, and, if he absconds from supervision, he may be prosecuted for the offense of escape.

(D) A parolee, furloughee, or other releasee who has violated any term or condition of pardon, parole, furlough, or other release shall be declared to be a violator if he is committed to a correctional institution outside the state to serve a sentence imposed upon him by a federal court or a court of another state or if he otherwise leaves the state.

(E) As used in this section, "peace officer" has the same meaning as in section 2935.01 of the Revised Code.